93-919

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LINDA WHITMORE,

Petitioner

vs.

BOARD OF EDUCATION OF DEKALB COMMUNITY SCHOOL DISTRICT NO. 428, JOHN REY, President of Board of Education School District No. 428, Individually, BERNARD LOONEY, Principal, Individually, DR. JACK DEERE, District Superintendent, Individually, KEN KENNEDY, Assistant Principal, Individually, and ROBERT WILLIAMS, Assistant Superintendent, Individually,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE BROAD EQUITABLE PRINCIPLES EMBODIED IN RULE 60(B) DEMAND RECONSIDERATION OF THE GRANTING OF SUMMARY JUDGMENT.

II. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT PLAINTIFF'S MOTION PURSUANT TO RULE 60(b) BY FAILING TO FIND THAT TWO JUDGES COMING TO DIAMETRICALLY OPPOSITE CONCLUSIONS BASED ON THE SAME SET OF FACTS CONSTITUTES "UNUSUAL CIRCUMSTANCES" UNDER SAID RULE.

III. WHETHER THE DISTRICT COURT'S DECISION IS CONTRARY TO PUBLIC POLICY AND WOULD SET A PRECEDENT VIOLATING THE FINELY STRUCK BALANCE BETWEEN SCHOOL BOARDS AND TEACHERS AS PROVIDED IN THE ILLINOIS SCHOOL CODE AND CONTRARY TO THE CONGRESSIONAL INTENT EXPRESSED IN THE FEDERAL FAMILY AND MEDICAL LEAVE ACT OF 1993.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Linda Whitmore, respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 4, 1993.

OPINIONS BELOW

The Order of the Court of Appeals is reported in a table only at 1 F.3d. 1245 (7th Cir. (Ill.)) (Table). Unofficial reports include: in the District Court, Judge Roszkowski's Amended Order at 1991 WL 166939 (N.D. Ill.), Judge Reinhard's Order at 1992 WL 70339 (N.D. Ill.); and in the Court of Appeals, the Order and Opinion at 1993 WL 290936 (7th Cir. (Ill.)). All relevant opinions and orders are reproduced in Appendix "A" incorporated herein by reference.

JURISDICTIONAL STATEMENT

The opinion of the Court of Appeals was entered on August 4, 1993. An Order denying Petitioner's Petition for Rehearing with

Suggestion for Rehearing in Banc was entered on September 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

All relevant provisions are included verbatim in Appendix "A". Citations of relevant provisions appear below.

FEDERAL STATUTES

42 U.S.C. Section 1983

42 U.S.C. Section 2000e-2(a)

42 U.S.C. Section 1985

Family and Medical Leave Act, 5 U.S.C.A. Section 6382 (1993)

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U.S. CONST. amend. I

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FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 60(b)

STATEMENT OF THE CASE

Petitioner Linda Whitmore applied for employment to the Respondent Board of Education in the summer of 1987 (R.4) Whitmore was a single person and then employed by the Board as a full-time high school teacher from 1987 to 1989. (R.4) During her employment she performed her duties and responsibilities as a teacher in a manner that earned her the praise and admiration of her colleagues, the school administration and the Respondents herein. (R.4) Whitmore also was involved in numerous extracurricular activities, including serving as the school's theatre director. At no time during this period of her employment did the Board or any Respondent herein question the abilities, character, fitness or performance of Whitmore. (R.4)

In July of 1988, Whitmore was a victim of a rape and as a result, she became pregnant. In November of 1988, Whitmore informed Bernard Looney, the Principal of DeKalb High School, of

the rape and resultant pregnancy. (R.4) Shortly thereafter, Whitmore met with Mr. Williams, the Assistant Superintendent, and Looney to discuss the pregnancy, including maternal leave and health insurance. (R.4) At that meeting and thereafter, Williams represented to Petitioner and to others that Whitmore's pregnancy would in no way affect her employment as a teacher. As a second-year teacher, Whitmore was evaluated after this conversation on three separate occasions by both Looney and Ken Kennedy, the Assistant Principal of DeKalb High School. (R.4) On the first two evaluations, performed on November 23, 1988 and January 6, 1989, Whitmore scored in the excellent to superior range. On the last evaluation, performed on March 2, 1989, by Looney, Whitmore scored in the satisfactory to excellent range. Possible scores ranged from unsatisfactory to superior. (R. 10-Group Exhibit A). The only criticism of Whitmore in any of her evaluations was a suggestion in one

evaluation that she should "show more enthusiasm."

On March 18, 1989, Looney informally told Whitmore that she would not be retained by the board. On this day, Petitioner and her mother met with Looney and Dr. Jack Deere to inquire about the specific reason for Petitioner's termination. They would only tell Petitioner that her performance had failed to meet District expectations, although Dr. Deere did mention a feeling of empathy with Plaintiff's mother because of the Petitioner's pregnant condition as a single person. On March 19, 1989, the Board passed a resolution terminating Whitmore. (R.4) On March 20, 1989, Whitmore was formally notified of her termination by a letter from Respondent John Rey. (R. 10-Group Exhibit A). The letter stated that the reason for discharge was "the performance of your duties has failed to meet the District's expectations." No further reference was ever made as to what expectations had not been met. The letter made

no reference to any preceding evaluations, none of which had in any event notified Ms. Whitmore of any deficiency in her performance. All of such preceding notes had been positive, except for the mention of enthusiasm in one evaluation.

On May 15, 1990, Petitioner filed a Complaint with the United States District Court for the Northern District of Illinois, Western Division charging Deprivation of Civil Rights under 42 U.S.C. Subsection 1983 (App. 86), Deprivation of Civil Rights by Conspiracy under 42 U.S.C. Subsection 1985 (App. 77), Violation of Civil Rights under Title VII (App. 86), and Intentional Infliction of Severe Emotional Distress. (R.4) On February 12, 1991, the presiding Judge, Honorable Stanley J. Roszkowski, granted in part and denied in part Respondent's Motion to Dismiss. (App. 12) In doing so, the district court applied the Illinois School Code, which states, in relevant part:

> Any teacher who has been employed in any district as a full-time teacher for a probationary period of two consecutive school terms shall enter upon contractual continued service unless given written notice of dismissal stating the specific reason therefor, by certified mail, return receipt requested by the employing board at least 60 days before the end of such period. Ill. Rev. Stat. ch. 122, para. 24-11 (1989) (emphasis added.)

In that Order, the Honorable Judge made a finding that Whitmore was tenured as a matter of law. (App. 21) The district court initially found that the plaintiff was not given sufficiently specific reasons for her termination as required by law, and that Petitioner therefore had entered continued contractual service (referred to as "tenure"), had a property interest in her employment and could not be terminated without due process requirements. (App. 20, 21, 51, 52) Upon motion by Respondents this finding was stricken from the Order as premature. (App. 42)

On February 24, 1992, the case was reassigned to the Honorable Philip G. Reinhard, a newly appointed Judge replacing Judge Roszkowski. On March 18, 1992, Judge Reinhard terminated

the case by granting Respondents' Motion for Summary Judgment and denying Petitioner's Motion for Partial Summary Judgment. (App. 72) On April 15, 1992, Petitioner filed a Motion to Reconsider, pursuant to Fed. R. Civ. P. 60(b)(1), (2) and (6). On June 9, 1992, the district court denied the motion. (App. 99) Petitioner filed an Appeal to the United States Court of Appeals for the Seventh Circuit on June 17, 1992. (R.14) The United States Court of Appeals for the Seventh Circuit affirmed the lower Court's denial of Petitioner's Motion to Reconsider on August 4, 1993. (App. 1) A Petition for Rehearing was denied on September 8, 1993. (App. 102)

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO GRANT PETITIONER'S MOTION PURSUANT TO RULE 60(B).

1. The Petitioner's Motion to Reconsider justifies relief under that section and should have been granted since equitable action was appropriate to accomplish justice in the instant case.

Rule 60(b) of the Federal Rules of Civil Procedure reads, in pertinent part:

> On motion and upon terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b)(1),(6)

Rule 60(b)(6) provides "a grand reservoir of equitable power to do justice in a particular case." Seven Elves, Inc. v. Eskenazi, 635 F.2d 401 (5th Cir. 1981). Furthermore as the Sixth Circuit noted in Fuller v. Quire, 916 F.2d 358, 361 (6th Cir. 1990), "Rule 60(b) is broadly drafted to give the trial judge discretion...to grant relief in unusual situations. It provides that the court may set aside a judgment for any other reason justifying relief from the operation of the judgment."

However, in denying Petitioner's Motion to Reconsider in the instant case, the district court relied on the language of the Seventh Circuit in Andrews v. Heinold, 771 F.2d 184,

188 (7th Cir. 1985), noting that "A party cannot use Fed.R.Civ. P. 60(b) as a substitute for appeal." (App. 100) However, in the case at bar, Petitioner's counsel was not relying on 60(b)'s protection as a means of avoiding the appellate process. Indeed, as the United States Court of Appeals for the Seventh Circuit noted in its opinion of August 4, 1993, Plaintiff filed her motion under Rule 60(b) well before the 30-day period for appeal had expired. (App. 2) Thus, it is clearly evident, as the Appellate Court noted, that "Whitmore was not attempting to evade the time limits of direct appeal under Rule 4(a)." (App. 10)

As the Appellate Court plainly indicated, the Petitioner was not attempting to evade the time limits of a direct appeal. Rather, the Petitioner was merely seeking an opportunity to receive justification as to why summary judgment was granted by Judge Reinhard, in direct contradiction with the findings of the

former presiding judge, Judge Roszkowski. Petitioner was merely seeking an opportunity to avail herself of the equitable relief which Rule 60(b) provides. Petitioner was determined to have these issues clarified by a hearing in the District Court, something she had been denied at the employment level as a single pregnant school teacher.

While Rule 60(b) is not a substitute for an appeal, "a liberal construction should be given the rule to the end that judgments which are void are vehicles of injustice not to be left standing." Klapprott v. United States, 335 U.S. 601, judgment modified, 336 U.S. 942 (1949). The Appellate Court, in affirming the District Court's decision, relied on a long line of cases involving Rule 60(b). (App. 3-6) However, those cases are distinguishable from the instant case. For instance, in Lee v. Village of River Forest, 936 F.2d 976 (7th Cir. 1991), the court affirmed the lower court's denial of Petitioner's Rule 60(b) motion. In

doing so, the court noted that the Petitioner did not file his motion until two and a half years after judgment and that he appeared to be "acting now to make up for earlier lapses in his exercise of his rights within the judicial system. The purpose of Rule 60(b) is not to reward a party for such afterthought. " Id at 980. However, while the Appellate Court relies on Lee in failing to reverse the district court's opinion, such reliance is misplaced. The Appellate Court itself noted that the Petitioner in the instant case was not trying to extend the period for appeal. She was acting well within the construction of the Federal Rules of Civil Procedure. Thus, Lee and its progeny are inapplicable to the instant case.

In the instant case injustice is clear in the rendering of the summary judgment by Judge Reinhard. Equitable principles demand review and the facts of the instant case demand reversal because the judgment entered was

manifestly unjust. As the Fifth Circuit so aptly noted in Fackelman v. Bell, 564 F.2d 734, 735 (5th Cir. 1977), the "purpose of the 60(b) motion is to permit the trial judge to reconsider such matters so that he can correct obvious errors or injustices and so perhaps obviate the laborious process of appeal."

In the instant case injustice is clear in the rendering of the summary judgment by Judge Reinhard. Equitable principles demand review and the facts of the instant case demands reversal because the judgment entered was manifestly unjust.

2. The District Court's denial of Petitioner's Motion to Reconsider was unjust in light of the "exceptional circumstances" which existed in the contrasting opinions of the judges.

While it is true that relief under Fed.R.Civ.P. 60(b) is an extraordinary remedy and is granted only in exceptional circumstances, the facts of the instant case warrant application of this remedy.

Reinsurance Co. v.-Adminstratia Asigurarilor, 902 F.2d 1275, 1277 (7th Cir. 1990) As has been previously noted, in the instant case, the first district judge made findings of fact favorable to the plaintiff which were later stricken as premature.

The findings of fact contained in Judge Roszkowski's original order and subsequently contested by the defendants were that: "Plaintiff's notice of dismissal made no reference to specific performance deficiencies; further, she had not been advised of any specific deficiencies prior to her dismissal." (App. 21, 22, 52) Furthermore, Judge Roszkowski's opinion stated: "The court finds that Defendants did not give Plaintiff sufficiently specific reasons for her termination, contrary to the requirements of the School Code. Therefore, Plaintiff was under continued contractual service as of the last day of her employment, and she had a protectable property interest in employment."

(App. 22, 52)

In response to Judge Roszkowski's Order, the Respondents filed Defendants' Exceptions to Court's Order and Motion for Reconsideration. In their motion, Respondents argued that the findings were premature and that the determination to be made on a Rule 12(b)(6) motion to dismiss is whether the allegations of the complaint are legally sufficient to state a cause of action. Furthermore, the Respondents argued that a 12(b)(6) motion is not the proper time to test the merits of the claim or judge between the factual allegations of the parties. Later, in his Order of February 12, 1991, Judge Roszkowski withdrew these premature findings, stating that "the court agrees that certain language in its Order of February 12, 1991, might be construed as making findings of fact, which are in appropriate (sic) on a motion to dismiss."

However, the case was later transferred from Judge Roszkowski to Judge Reinhard.

Despite the fact that one of his brethren had been so convinced that facts highly favorable to the Petitioner existed on the face of the pleadings that he was persuaded to make premature findings, Judge Reinhard granted Respondent's Summary Judgment motion. (App. 72) Without considering whether Judge Reinhard ever had knowledge of Judge Roszkowski's factfinding, it can not be said why one Judge found Petitioner to be tenured and entitled to due process, charges and hearing prior to termination, and the next judge in the same court room and case determines the opposite. Certainly, Petitioner as a decent citizen should be entitled to question why she is possessed of a property right per one ruling and then denied again of her employment rights by a new judge.

The Appellate Court noted that the two judges were engaged in different types of review. The Appellate Court emphasized that since the two judges were engaged in different types of

review, it was not surprising that could have reached "different conclusions." (App. 8) The Appellate Court aptly notes that Judge Roszkowski analyzed the pleadings under Rule 12(b)(6), while Judge Reinhard engaged in weighing the pleadings under Summary Judgment. However, the Appellate Court fails to address that the second standard, that of Summary Judgment, is actually a more stringent standard. Under Rule 56 summary judgment is only appropriate if there is no genuine issue as to any material fact, construing evidence in the light most favorable to the non-moving party, who is Petitioner herein. Anderson v. Liberty Lobby, Inc. 477 U.S. 242 (1986).

Essentially, Judges Roszkowski and Reinhard were engaged in the same standard of review. Respondents took exception to Judge Roszkowski's Dismissal because it was a premature ruling on the facts of the case, in essence, that Judge Roszkowski had engaged in a standard of review appropriate to a Summary

Judgment, not a Rule 12(b)(6) Motion to Dismiss. Judge Roszkowski amended his Order and struck the factual findings, not from a conclusion that he had erroneously interpreted the facts of the case, but because he had engaged in a Summary Judgment standard of review. If Judge Roszkowski had not found that he was using the same standard of review subsequently used by Judge Reinhard in his Summary Judgment, he would not have amended his Dismissal Order to reflect that no findings of fact were entered.

Those matters contained in the Order of the Honorable Stanley J. Roszkowski clearly show that material questions of fact do exist in this matter. Even the Respondents recognized in their Exception Motion that material issues of fact existed. Furthermore, Judges Roszkowski and Reinhard made diametrically opposite conclusions based not only on the same set of facts, but on the same set of facts evaluated in the context of identical language

cited from the same case authority. Both judges quoted Howard v. Board of Educ. of Freeport Sch. Dist. No. 145, 513 N.E.2d 545 (2d Dist. Ill. 1987), and predicated their opinions upon this case, yet reached opposite conclusions. (App. 51, 52, 84, 85) Certainly if two judges could differ so widely on the same issue, based on the same set of facts, evaluated in the context of identical case authority, a question of fact remains to be determined. However, Judge Reinhard took the question away from the jury, in abuse of his discretion, and terminated Petitioner's action.

The Appellate Court proceeded to note that Judge Reinhard's decision held that under Illinois law the performance deficiencies noted in Whitmore's evaluations, in conjunction with written notice of termination, met the statutory requirements, deferring to Judge Reinhard's analysis. (App. 10) However, the Appellate Court and Judge Reinhard failed to properly distinguish the facts of Howard,

properly distinguish the facts of Howard, despite Judge Roszkowski's prior analysis clearly distinguishing the two cases. In Howard, the notice of dismissal stated that the employee failed to adequately supervise employees under his control, while previous evaluations had also disclosed to the employee his deficiencies in supervision of other employees, therefore the court found that the prior evaluations were implicitly incorporated by reference as sufficiently specific notice to the employee. Howard at 548.

In the instant case, the notice of dismissal merely made the broad statement that Petitioner had failed to meet the employer's expectations, and did not contain any language similar to the comment in a prior evaluation that Petitioner failed to show sufficient enthusiasm, therefore the notice of dismissal does not implicitly incorporate the prior evaluation and is not sufficiently specific notice to Petitioner. Judge Roszkowski accurately recognized that

these cases were distinguishable and that the instant case failed to meet the standard of Howard (App. 21, 22, 51, 52), however, the Appellate Court deferred to Judge Reinhard's decision that Whitmore was not tenured. In doing so, the Appellate Court misinterpreted the holding in Howard.

The purpose of the specificity requirement is to prevent school districts from arbitrarily dismissing teachers for "vague and nebulous" reasons or an indefinite reason such as "failure to perform adequately." Burns v. Board of Educ. of Fairfield Sch. Dist. No. 112 of Wayne County, 362 N.E.2d 353 (5th Dist. Ill. 1977). It is difficult to imagine more vague and nebulous language than "the performance of your duties has failed to meet the District's expectations." Indeed, this language bears a striking resemblance to the "failure to perform adequately" that was found to be indefinite and insufficient notice in Burns. The District Court's refusal to reconsider its summary

judgement is clearly contrary to established Illinois case law, and equitable principles clearly require that court to reconsider to prevent injustice.

The Appellate Court states that Judge Reinhard's decision is "the very same conclusion arrived at by the first judge after he recognized that he had ruled prematurely on the issue." (App. 10) This is clearly a misreading of the Judge Roszkowski's order and a gross misstatement of what really occurred. Judge Roszkowski merely deleted the above-referenced sections in his original order which were contested by the Respondents in their Motion. Judge Roszkowski deleted those findings merely because he found them to be "in appropriate (sic) on a motion to dismiss".

It is clear from the language of the order that Judge Roszkowski, contrary to the Appellate Court's opinion, did not find that the statutory requirements were met in the instant case. Judge Roszkowski never found that

Ms. Whitmore was not tenured. He merely found that his finding to the contrary was "inappropriate" for the motion. In fact his words in his original opinion clearly indicate that he found Ms. Whitmore's contentions to be so strong and factually sound that he was persuaded to prematurely find in her favor on these issues.

While it is true that Judge Roszkowski vacated in part the February 12, 1991 Order, that part dealing with the finding that Petitioner was tenured as a matter of law, he did so because Respondents claimed that it was premature and outside of the scope of the matters raised in their Motion to Dismiss. (R.44) Judge Roszkowski's original findings, contrasted with Judge Reinhard's findings clearly indicate that there are indeed substantial questions of fact remaining to be resolved. However, on March 18, 1992, Judge Reinhard terminated Petitioner's action with a ruling that was in direct contradiction to the

prior ruling of Judge Roszkowski. (App. 72) Judge Reinhard's ruling terminated Petitioner's cause of action before any factual matters could be determined by the jury. Genuine issues of material fact obviously exist since two consecutive members of the same court issued contradicting rulings.

Judge Roszkowski did not enter an Amended Order because his legal conclusion was incorrect, but because it was premature. His original, and never recanted, conclusions are in direct contradiction to Judge Reinhard's conclusions in his summary judgment. If two educated and experienced judges differ as to whether Ms. Whitmore was tenured, it is likely that "reasonable minds would differ" and that material facts are in dispute.

Therefore, there is a substantial danger that Judge Reinhard's Summary Judgment was unjust, since the only circumstance that would preclude his Judgment being unjust, is a conclusion that Judge Roszkowski's findings of

fact were in error and the product of an unreasonable mind. It is evident that this direct contradiction by the jurists is an extraordinary circumstance that indicates a substantial danger that Judge Reinhard's Summary Judgment was unjust, thereby warranting a Rule 60(b)(6) Motion to Reconsider.

II. THE DISTRICT COURT'S REFUSAL TO RECONSIDER ITS DECISION WILL ESTABLISH A PRECEDENT THAT IS CONTRARY TO PUBLIC POLICY.

1. The District Court's decision violates the finely struck balance between teachers and school boards established in the Illinois School Code.

The Illinois School Code provides in relevant part:

> Any teacher who has been employed in any district as a full-time teacher for a probationary period of 2 consecutive school terms shall enter upon contractual continued service unless given written notice of dismissal **stating the specific reasons therefor . . .**

S.H.A. 105 ILCS 5/24-11 (emphasis added).

The specific reasons "must fairly apprise the teacher of the alleged deficiency upon which

the employer-school board bases its dismissal action, and with sufficient specificity to enable the teacher to refute the charge." Howard, 513 N.E.2d at 547. Judges Roszkowski and Reinhard both relied upon this authority in their orders. Furthermore, both judges relied upon Howard to conclude that prior evaluations may be incorporated by reference (App. 21, 51, 52, 84), although Judge Reinhard failed to recognize that the instant case, as mentioned previously, failed to meet the specificity requirements of Howard, since the language of the notice of dismissal did not use sufficiently specific language to incorporate the prior evaluation by reference.

This section imposes a liability on school districts to provide specific reasons for dismissal and must be strictly construed. Illinois Educ. Ass'n Local Community High Sch. Dist. 218 v. Board of Educ. of Sch. Dist. 218, Cook County, 340 N.E.2d 7 (Ill. 1975). This section was also enacted primarily to serve as

a protection for teachers and to improve school systems. Donahoo v. Board of Educ. of Sch. Dist. No. 303, 109 N.E.2d 787 (Ill. 1953). Therefore, Illinois case law has indicated that Judge Reinhard's liberal interpretation of the standard established in Howard is not only contrary to case law, but also contrary to the intent of Illinois' legislature and public policy.

As recognized in Burns and Howard and mentioned previously, the "specific reasons" requirement of the Illinois School Code strikes an important balance between employee teachers and employer school boards. As mentioned above, said School Code must be strictly construed to prevent the weakening of the protection it provides teachers. If the District Court is permitted to refuse reconsideration of its summary judgment and allows its decision to remain, this balance will be seriously disrupted. It is against the intent of the Code and against public policy to

allow school boards to provide vague and nebulous reasons such as "failure to meet expectations" and then allow courts to hold that this broad and indefinite statement implicitly incorporates any earlier criticism, even where there is no similarity between the language of the dismissal and the prior evaluation, and when that prior criticism was given the score of "satisfactory." In effect, school boards will be given wide latitude in arbitrary dismissals, since even the most vague and arbitrary dismissal is likely to fall within the standard that would be established by the District Court's decision.

2. The District Court's decision is contrary to Congressional intent expressed in the recent enactment of the federal Family and Medical Leave Act.

Congress has recently enacted the Family and Medical Leave Act of 1993 to prevent the very abuses which Petitioner alleged in her Complaint. Petitioner does not argue that this Act should be applied retroactively, but rather

suggests that this enactment clearly indicates the federal legislature's intent to prevent employers from dismissing employees that seek maternal leave or discriminating against pregnant women, as she has alleged. The Act provides in relevant part:

> Subject to section 6383, an employee shall be entitled to a total of 12 administrative workweeks of leave during any 12-month period for one or more of the following: (a) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

Family and Medical Leave Act, 5 U.S.C.A. Section 6382 (1993).

Allowing the District Court to refuse to reconsider its decision will in effect give school districts a "how-to" manual and guide giving practical advice on how to evade the provisions of the Family and Medical Leave Act and the Illinois School Code. A school board merely needs to give teachers evaluation scores that are marginally satisfactory, need never tell them that scores of "satisfactory" actually indicate unsatisfactory performance

and may be used to terminate them, and then dismiss them before they can request maternity leave, stating that somewhere in the myriad duties of a teacher, somewhere between abusing students and allowing chalk to squeak on the blackboard, they have "failed to meet the District's expectations." Mandating that the District Court reconsider its decision to grant summary judgment not only upholds and fosters current Illinois and federal legislated intent and public policy, but also will prevent a gross injustice being committed upon Petitioner.

CONCLUSION

In conclusion, the Court of Appeals erred when it failed to recognize that the District Court wrongfully denied Petitioner's Motion to Reconsider. The District Court, in its ruling granting Respondents' Motion for Summary Judgment and denying Petitioner's Motion for Partial Summary Judgment did not fully recognize and analyze all the factors involved

in the case. The District Court did not recognize that obvious issues of material fact which existed. Since the previous presiding Judge on the bench made a ruling in direct contradiction to that of Judge Reinhard, there must have been a material issue of material fact.

Furthermore, the Petitioner has shown that the District Court's ruling granting the Respondents' Motion for Summary Judgment went contrary to the "plain language" of Ill. Rev. Stat. Ch. 122, Section 24-11 (1989), as well as well-settled caselaw. Thus, Petitioner has shown that she was denied the notice required by Section 24-11 and therefore should be tenured as a matter of law. The Petitioner has shown the District Court that the well-pleaded fact, evidence and affidavits were not taken in a light most favorable to the non-movant. Instead, the Petitioner has shown the District Court that these facts, evidence and affidavits were erroneously taken in a light most

favorable to the moving party. Finally, the District Court's refusal to reconsider its decision is contrary to public policy and legislative intent, as evidenced by the provisions of the Illinois School Code and the federal Family and Medical Leave Act.

For these and other reasons, it is clear that the Court of Appeals failed to recognize that the District Court erred when it denied Petitioner's Motion to Reconsider. The District Court failed to recognize numerous factors in its original ruling and then erred when it refused to reconsider its ruling. This Honorable Court should, therefore, reverse the Court of Appeal's Order affirming the District Court's ruling denying Petitioner's Motion to Reconsider and remand this matter to the District Court for a trial on the issues,

reconsideration, or any other relief this Court deems just.

Respectfully submitted,

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Petitioner

vs.

BOARD OF EDUCATION OF DEKALB COMMUNITY SCHOOL DISTRICT NO. 428, JOHN REY, President of Board of Education School District No. 428, Individually, BERNARD LOONEY, Principal, Individually, DR. JACK DEERE, District Superintendent, Individually, KEN KENNEDY, Assistant Principal, Individually, and ROBERT WILLIAMS, Assistant Superintendent, Individually,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 4, 1993.

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

LINDA WHITMORE, Plaintiff-Appellant,	Appeal from the United States District Court for the Northern District of Illinois, Western Division.
No. 92-2442 v.	
BOARD OF EDUCATION OF DEKALB COMMUNITY SCHOOL DISTRICT NO. 428, individually, BERNARD LOONEY, Principal, individually, et al.,	No. 90 C 20143
	Philip G. Reinhard, Judge.
Defendants-Appellees.	

ORDER

Linda Whitmore appeals from the district court's denial of her motion to reconsider under Federal Rule of Civil Procedure 60. We affirm.

I

Whitmore, a high school teacher, sued the DeKalb school board and various school district

officials after the board voted not to renew her contract. She sought relief pursuant to 42 U.S.C. §§ 1983, 1985, 2000e-h, as well as under state law for intentional infliction of emotional distress.

The district court granted in part and denied in part the defendants' motion under Federal Rule of Civil Procedure 12(b)(6). Initially, the court found that Whitmore had not received sufficiently specific reasons for her termination. Subsequently, however, the district court vacated that order and deleted its finding that Whitmore had received tenure under state law.

Another judge took over the case and granted the defendants' motion for summary judgment as to all of Whitmore's claims. She then filed a "motion to reconsider" the summary judgment pursuant to Federal Rule of Civil Procedure 60(b), but before the time for taking a direct appeal had expired. The district court denied this motion and Whitmore appealed.

II

A motion under Rule 60(b) seeks an extraordinary remedy. Merit Insurance Co. v. Leatherby Insurance Co., 714 F.2d 673, 683 (7th Cir.), cert. denied, 464 U.S. 1009 (1983). That is especially true under Rule 60(b)(6). Although this "catch-all provision", id., authorizes the district court to vacate its order or judgment for "any reason justifying relief from the operation of the judgment", Rule 60(b)(6) is not as open-ended as its language or nickname suggest. Relief is available only (1) if Rules 60(b)(1) through (5) do not apply; and (2) if the district court, in its sound discretion, finds that equitable action is necessary to accomplish justice. Peacock v. Board of School Comrs., 721 F.2d 210, 214 (7th Cir. 1983) (per curiam). These conditions will obtain only in "extraordinary circumstances that create a substantial danger that the underlying judgment was unjust." Margoles v. Johns, 798 F.2d 1069, 1073 (7th Cir. 1986), cert. denied,

482 U.S. 905 (1987); C.K.S. Engineers, Inc. v. White Mountain Gypsum Co., 726 F.2d 1202, 1204-05 (7th Cir. 1984)("the general rule in this circuit is that relief from a judgment under [R]ule 60(b) is an extraordinary remedy and is granted only in exceptional circumstances."). Cf. Pioneer investment Services Co. v. Brunswick Assocs. Ltd. Partnership, 113 S.Ct. 1489, 1497 (1993).

Our cases emphasize that Rule 60(b) is a substitute neither for direct appeal nor for a motion under Rule 59. In Parke-Chapley Construction Co. v. Cherrington, 865 F.2d 907 (7th Cir. 1989), for instance, Judge Cummings explained the rationale for this limitation on Rule 60(b):

> If plaintiff believed the district court was mistaken as a mater of law in dismissing the original complaint, he should have appealed . . . or he might have filed a timely motion under FRCP 59 to vacate the judgment of dismissal and for leave to amend his complaint . . . The policy behind such a reading of FRCP 60(b) is clear; parties should not be allowed to escape the consequences of their failure to file a timely appeal by addressing questions of law to the trial

> court for reconsideration. That is the function of appellate courts. If allowed to raise the same questions in a FRCP 60(b) motion that would have been raised in an appeal from the merits, a party would be able to effect an indirect extension of the time for appeal by appealing the FRCP 60(b) motion within thirty days of its disposition.

Id. at 915 (quotations and citations omitted).

The function of Rule 60(b) necessarily narrows the scope of this court's review to a "most limited" consideration. Reinsurance Company of America, Inc. v. Administratia de Stat, 902 F.2d 1275, 1277 (7th Cir. 1990). Regardless of whether "relief from the judgment might have been obtained had an appeal been taken", Parke-Chapley Construction Co., 865 F.2d at 915 (quotation and citation omitted), the court may consider only whether the district court abused its discretion. In the absence of extraordinary circumstances, reaching the merits of the underlying judgment

is not permissible. Lee v. River Forest, 936 F.2d 976, 979 (7th Cir. 1991). Brennan v. Midwestern United Life Insurance Co., 450 F.2d 999, 1003 (7th Cir. 1971)(court's function in reviewing the denial of a Rule 60(b) motion is "not to determine whether the court was substantively correct in entering the judgment from which relief was sought but is limited to deciding whether the judge abused his discretion . . ." in ruling that motion failed to show sufficient grounds for relief)(citations omitted), cert. denied, 450 U.S. 999 (1972).

Whitmore's arguments in favor of her motion fail to satisfy the rigorous standards of Rule 60(b). The district court found that Whitmore's motions contained no grounds justifying relief under subsection (1) (mistake, inadvertence, surprise, or excusable neglect), or under subsection (2) (newly discovered evidence that could not have been discovered by due diligence in time to move for

a new trial). Moreover, the district court judge concluded that Whitmore was not entitled to relief under subsection (6). In reaching this conclusion, the district court neither committed an error of law nor exceeded permissible bounds of judgment.

Whitmore fails to argue on appeal what she needs to show: that the district court abused its discretion. Instead, she appears to be challenging the district court's order granting summary judgment, presenting her arguments as through this court were engaged in de novo review of a question of law. Our review of the denial of a motion under Rule 60(b)(6) in certain circumstances will require us to consider the merits underlying a summary judgment. But whitmore seems to think that there was a substantial danger that this underlying judgment was unjust because the judge who granted the summary judgment reached what her lawyer characterized at oral argument as a different conclusion than the first judge.

There are at least three things wrong with this description of events.

The two judges, first of all, were not engaged in the same type of review. So it is not surprising that they could have reached "different conclusions." The first judge considered the defendants' motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The second judge entertained the defendants' motion for summary judgment. A court's consideration of whether a complaint states a legal claim versus its determination whether the absence of a material issue of fact entitles a party to judgment easily can lead to different conclusions. Many a complaint--this one, for instance--clears the hurdle of a Rule 12(b)(6) motion only to succumb to a motion for summary judgment. If one judge happens to deny the 12(b)(6) motion and another grants summary judgment, neither one nor the other need have reached "the wrong result."

but the judges here did not, as whitmore alleges, reach different legal conclusions. In granting in part and denying in part the motion under Rule 12(b)(6), the first judge initially found that Whitmore was not given sufficiently specific reasons for her termination--a requirement under Illinois law. Accordingly, he found her to be tenured as a matter of law. In response, the defendants filed exceptions to that ruling, arguing that they were entitled to present evidence that Whitmore's evaluations provided actual notice of her deficiencies. The district court subsequently struck its original order a premature and entered an amended order that deleted the finding that Whitmore had achieved tenure. That is how matters stood when the second judge assumed control of the case. After considering the pleadings, Judge Reinhard granted summary judgment to the defendants on all claims. His decision held that under Illinois law the performance deficiencies noted in Whitmore's

evaluations, in conjunction with written notice, met the statutory requirements. Accordingly, she was not tenured. This is the very same conclusion arrived at by the first judge after he recognized that he had ruled prematurely on the issue.

Third, even if Whitmore were correct that the two judges reached opposite conclusions, we fail to see how there would be a substantial danger that the last judgment necessarily would be unjust.

Unlike many of the parties in cases we see involving Rule 60(b), Whitmore was not attempting to evade the time limits of direct appeal under Rule 4(a). She filed her motion under Rule 60(b) before the 30-day period for appeal had expired. Since Whitmore in essence is seeking to challenge the district court's conclusions of law in entering summary judgment, she should have filed a direct appeal in a timely manner. Rule 60(b)(6) does not allow her attorney to undo his strategic

mistakes.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

LINDA WHITMORE, Plaintiff,	)	
v.	)	No. 90-C-20143
BOARD OF EDUCATION OF DEKALB COMMUNITY SCHOOL DISTRICT NO. 428, JOHN REY, President of the Board of Education School District No. 428, Individually, BERNARD LOONEY, Principal, Individually, DR. JACK DEERE, District Superintendent, Individually, KEN KENNEDY, Assistant Principal, Individually, and ROBERT WILLIAMS, Assistant Superintendent, Individually,	)	Dated: February 12, 1991
Defendants.	)	

ORDER

Before the court is Defendants' motion to dismiss Plaintiff's complaint. For the reasons set forth in this Order, the court grants in part and denies in part Defendants' motion. Further, the court grants Plaintiff leave to

file an amended complaint within thirty days in accordance with this Order.

BACKGROUND

On May 15, 1990, Plaintiff, Linda Whitmore, filed a complaint in this court against the following Defendants: Board of Education of DeKalb Community School District No. 428 (hereinafter "Board"); and, in their individual capacities, Board President John Rey, Principal Bernard Looney, District Superintendent Dr. Jack Deere, Assistant Principal Ken Kennedy, and Assistant Superintendent Robert William. Plaintiff alleges a cause of action against Defendants under 42 U.S.C. Sections 1983, 1985, 1988 (1988), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e - 2000h (1988), and also a state law claim of intentional infliction of emotional distress.

The following information is taken from Plaintiff's complaint. Defendant Board employed Plaintiff as a full-time high school teacher form the fall 1987 semester until 1989. In July

1988, Plaintiff was raped and became pregnant as a result of the rape. In November 1988 Plaintiff informed Principal Looney of the rape and pregnancy. Assistant Principal Kennedy and Principal Looney evaluated Plaintiff's teaching performance on three occasions: November 23, 1988; January 6, 1989; and March 2, 1989. In the first two evaluations, Plaintiff was rated in the excellent to superior range, and in the third evaluation she was rated in the satisfactory to excellent range.

On or about March 19, 1989, the Board adopted and passed a resolution dismissing Plaintiff from her employment. On March 29, 1989, Plaintiff was notified of her termination through a letter from Board President Rey. This letter stated that Plaintiff was being terminated because the performance of her duties had failed to meet the District's expectations. On that date, Plaintiff was nine months pregnant and unmarried. Plaintiff was able to secure other employment as a teacher after repeated

efforts over a long period of time.

DISCUSSION

In analyzing a motion to dismiss, this court will not dismiss a complaint unless it is clear there are no set of facts that Plaintiffs could prove consistent with the pleadings that would entitle them to relief. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Murphy v. Lane, 833 F.2d 106, 107 (7th Cir. 1087); Vaden v. Village of Maywood, 809 F.2d 361, 363 (7th Cir.), cert. denied, 482 U.S. 908 (1987). The court will accept all well-pleaded factual allegations in the complaint as true. Vaden, 809 F.2d at 363; Doe v. St. Joseph's Hosp. of Fort Wayne, 788 F.2d 411, 414 (7th Cir. 1986). In addition, this court will view the allegations in a light most favorable to the non-moving party. Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984), cert. denied, 470 U.S. 1054 (1985); Wolfolk v. Rivera, 729 F.2d 1114, 1116 (7th Cir. 1984).

Statute of Limitations

Defendants filed their motion to dismiss on July 5, 1990. Defendants advance several arguments in support of their motion, the first of which is that Plaintiff's complaint is barred by the statute of limitations. Defendants argue that the one-year statute of limitations found in the Illinois Tort Immunity Act applies. Ill.Rev. Stat. ch. 85, para. 8-101 (1989). The Supreme Court's ruling in Owens v. Okure, 488 U.S. 235 (1989(, is the final word on the statute of limitations for Section 1983 actions. The Owens court stated:

> We accordingly hold that where state law provides multiple statutes of limitations for personal injury actions, courts considering Sections 1983 claims should borrow the general or residual statute for personal injury actions.

Id. at _____, 109 S. Ct. at 582.

Therefore, Section 1983 actions brought in Illinois are subject to the one general statute of limitations for personal injury actions. The Seventh Circuit has ruled that Illinois's two-year statute of limitations for personal

injury applies to Section 1983 actions brought in Illinois. Kalimara v. Illinois Dep't of Corrections, 879 F.2d 276, 277 (7th Cir. 1989). The Illinois Code of Civil Procedure provides that personal injury actions shall be brought within two years after the cause of action accrued. Ill. Rev. Stat. ch. 110, para. 13-202 (1989). The court finds that Plaintiff's claims under 42 U.S.C. Sections 1985 and 1988, because they relate to and depend upon, respectively, Plaintiff's Section 1983 claims, are also subject to the two-year statute of limitations.

Defendant does not specifically argue that Plaintiff's Title VII claim is also barred by the statute of limitations. Therefore, the court need not address the timeliness of Plaintiff's Title VII claim.[2] Defendant does

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[2]In Illinois, persons complaining of Title VII violations must file discrimination charges with the Illinois Department of Human Relations within 180 days of the discriminatory act. Haag v. Board of Education, 655 F. Supp. 1267, 1270 (N.D. Ill. 1987).

contend that Plaintiff's pendent state claim for intentional infliction of emotional distress was not timely filed. Defendant implies that the statute of limitations began to run for this claim on March 20, 1989, the date Plaintiff says she received notice of termination from Defendants. Therefore, Defendants argue, Plaintiff missed the one-year statute of limitations because she filed suit on May 15, 1990.

The court rejects Defendants' argument. Plaintiff's pendent state claim alleges an intentional tort: intentional infliction of emotional distress. Plaintiff alleges that Defendants committed this tort by terminating her, and also because "[a]s a direct result of the said dismissal, Plaintiff became the subject of frequent and negative comments and sayings by other employees of Defendant Board." Plaintiff's complaint, filed May 15, 1990, at 11. The Seventh Circuit has ruled that the statute of limitations does not begin to run

for a continuing wrong until the wrong is finished. Taylor v. Meirick, 712 F.2d 1112, 1118 (7th Cir. 1983). Where a tort involves repeated injury, the statute of limitations begins to run on the date of the last injury, or when the tortious activity ends. Gass v. Metro-East Sanitary Dist., 186 Ill. App. 3d 1077, _____, 542 N.E. 2d 1229, 1234, appeal denied, 128 Ill. 2d 663, 548 N.E.2d 1068 (1989). It is reasonable to infer that Plaintiff is alleging that the emotional distress she suffered was a continuing injury, which did not end on March 20, 1989, and that the "frequent and negative comments and sayings" about her extended past that date. Therefore, the court finds that Plaintiff filed her pendent state law claim within the one-year statute of limitations of the Illinois Tort Immunity Act.

Employment Status

Defendants argue that Plaintiff had no

property or liberty interest in continued employment because she was a nontenured, probationary teacher at the time of her dismissal. Defendants allege that the letter informing Plaintiff of her dismissal complied with the requirements of the Illinois School Code of 1961. The relevant portion of the School Code reads:

> Any teacher who has been employed in any district as a full-time teacher for a probationary period of 2 consecutive school terms shall enter upon contractual continued service unless given written notice of dismissal stating the specific reason therefor, by certified mail, return receipt requested by the employing board at least 60 days before the end of such period.

Ill. Rev. Stat. ch. 122, para. 24-11 (1989) (emphasis added).

According to Plaintiff, Defendant Rey's letter to her "stated that the reason for the discharge was, 'the performance' of your duties has failed to meet the District's expectations." Plaintiff's complaint at 5. One Illinois appellate court defined "specific reason", under the portion of the School Code

quoted above, as a reason which fairly apprises the teacher of the alleged deficiency upon which the dismissal is based, and which is sufficiently specific for the teacher to be able to refute the charge. Wade v. Grantie City Community Unit School Dist. No. 9, 71 Ill. App. 2d 34, 36, 218 N.E.2d 19, _____ (1966).

Another Illinois appellate court found to be sufficiently specific a dismissal letter giving the reason "your inability to adequately supervise employees under your control." Howard v. Board of Educ. of Freeport School Dist. No. 145, 160 Ill. App. 3d 309, ____, 513 N.E.2d 545, 547 (1987). The court noted that this notice was sufficient because it "contained a specific reference to plaintiff's supervisory duties", and also because the plaintiff had been advised of his specific performance deficiencies on numerous occasions. Id. at _____, 513 N.E.2d at 547-48. Here, Plaintiff's notice of dismissal made no reference to specific performance deficiencies;

further, she had not been advised of any specific deficiencies prior to her dismissal. Therefore, the "reason" given Plaintiff contains none of the specificity required under Wade and Howard. The court finds that Defendants did not give Plaintiff sufficiently specific reasons for her termination, contrary to the requirements of the School Code. Therefore, Plaintiff was under continued contractual service as of the last day of her employment, and she had a protectable property interest in employment.

Property and Liberty Interests in Employment

As just noted, Plaintiff was no longer a probationary teacher at the end of her employment with Defendant Board. Therefore, Plaintiff possessed a property interest in continued employment as a teacher by virtue of the Illinois School Code, Ill. Rev. Stat. ch. 122, para, 24-11 (1989).

To show that she has been denied procedural due process, Plaintiff must allege that she was

denied notice and/or an opportunity for a hearing, the two elements which are the essence of procedural due process. The court dismisses the portions of Plaintiff's complaint which allege that she was deprived of her property interest in employment without due process of law. However, the court grants Plaintiff leave to amend her complaint to allege specifically how she was denied notice and/or opportunity for a hearing regarding her dismissal.

Plaintiff also claims that Defendants deprived her of liberty interest in employment. The Seventh Circuit has held that only a dismissal that is accompanied by serious public charges of misconduct preventing the employee from obtaining other employment of comparable responsibility may deprive the employee of his or her liberty interest in employment. Jungels v. Pierce, 825 F.2d 1127, 1131 (7th Cir. 1987).

Plaintiff's allegations regarding her liberty interest in employment do not state that the reason for her dismissal was made public, nor

that the reason given was a serious charge of misconduct. Plaintiff alleges only that because Defendants dismissed her, she was unable to secure other employment as a teacher for a long period of time. Therefore, Plaintiff has not met the Jungels test for deprivation of liberty. Accordingly, the court dismisses the portions of Plaintiff's complaint that allege deprivation of liberty interest without due process of law. However, the court grants Plaintiff leave to amend her complaint in accordance with the test in Jungels v. Pierce, 825 F.2d 1127 (7th Cir. 1987).

Equal Protection

Defendants argue that Plaintiff has failed to state a Section 1983 claim for denial of equal protection. A person may state a claim for denial of equal protection by alleging that the government has infringed on a fundamental right. Supreme Court precedent clearly shows that a person's decisions regarding marriage and child bearing represent fundamental rights

which are constitutionally protected from improper state infringement. Paul v. Davis, 424 U.S. 693, 713 (1976) ("matters relating to marriage, procreation, contraception, family relationships, and child rearing and education" are constitutionally protected); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (the right of privacy includes the right of persons, whether married or single, to decide whether to bear children). This court has noted that without question, an unmarried woman has a substantive due process right to conceive and raise her child without unwarranted state intrusion. Eckmann v. Board of Educ. of Hawthorn School Dist. No. 17, 636 F. Supp. 1214, 1218 (N.D. Ill. 1986). Therefore, Plaintiff, an unmarried woman who chose to bear and raise her child, has sufficiently pleaded a claim for denial of equal protection.

Violations of the Bill of Rights

Plaintiff has pleaded that Defendants have deprived her of her rights under the first, fourth, fifth, sixth, ninth, tenth, and fourteenth amendments. In her answer brief to Defendants' motion to dismiss, Plaintiff concedes that the fourth, sixth, and tenth amendments are inapplicable. Therefore, the court dismisses the portions of Plaintiff's complaint which allege a cause of action under the fourth, sixth, and tenth amendments to the U.S. Constitution.

Plaintiff's complaint does not identify in what particular way Defendants violated her rights under the remaining constitutional amendments. Rather, Plaintiff states only generally that Defendants:

> have acted under color of State Law to wrongfully invade WHITMORE'S private life and otherwise to deprive her of her right to privacy free from governmental interference guaranteed by the 1st, 4th, 5th, 6th, 9th, 10th, and 14th Amendments to the Constitution of the United States, and by the Constitution of the State of Illinois.

Plaintiff's complaint at 6.

The only portion of the first amendment which the court can conceive of as applicable is the right "to petition the Government for a redress of grievances." U.S. Const. amend. I. Plaintiff has nowhere alleged that she requested and was denied the opportunity for a hearing concerning her dismissal. The first amendment has been found to confer a right to privacy in speech or association, but not in matters of freedom of choice in the matters of family and marriage. Thus, the court finds that Plaintiff has failed to state a claim under the first amendment. Accordingly, the court dismisses those portions of Plaintiff's complaint which state a cause of action based on the first amendment to the U.S. Constitution. However, as noted on page 7 of this Order, the court grants Plaintiff leave to amend her complaint to allege that she requested and was denied the opportunity for a hearing regarding her termination.

Plaintiff has alleged that Defendants deprived her of a recognized substantive due process right: the right of an unmarried woman to bear and raise a child out of wedlock. The grand jury clause is the only clause in the fifth amendment which the Supreme Court has specifically held is not incorporated into the fourteenth amendment. Therefore, Plaintiff can properly allege that her substantive due process right emanates from the fifth and fourteenth amendments. Further, as described in the above section on Equal Protection, Plaintiff has properly pleaded a cause of action under the equal protection clause of the fourteenth amendment.

Defendants argue that the ninth amendment is inapplicable because of her condition as a pregnant unmarried woman. This is an argument on the merits of Plaintiff's claim, and not an explanation of why the ninth amendment is inapplicable. For the purpose of this motion to dismiss, the court must assume that

Plaintiff's allegations are true. If they are true, then Plaintiff has a cause of action under the ninth amendment right to familial privacy, as articulated in Griswold v. Connecticut, 381 U.S. 479, 484 (1965). Plaintiff asserts the right to decide the composition of her own family; in other words, her decision not to marry, and to raise a child.

Conspiracy under 42 U.S.C. Section 1985

Evidence of a conspiracy is rarely proven directly, and is often proven by circumstantial evidence. Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979), rev'd in part on other grounds, 446 U.S. 754 (1980). However, to survive a motion to dismiss, a claim of civil rights conspiracy must be sufficiently specific. Conclusory allegations alone are insufficient; if they are part of the claim, they must at least be accompanied by supporting factual allegations. Sparkman v. McFarlin, 601

F.2d 261, 265-66 (7th Cir. 1979) (Sprecher, J., concurring), citing Hansen v. Ahlgrimm, 520 F.2d 768 (7th Cir. 1975), and other Seventh Circuit cases so holding.

Plaintiff has alleged that Defendants acted in concert to deprive Plaintiff of equal protection through dismissing her. The concept of intracorporate immunity is inapplicable because Defendant Board has not shown that it is a corporation; because the other Defendants are named in their individual capacities; and because, even if Defendant Board were a corporation, the individual employees of Defendant Board are named as co-conspirators. Cross v. General Motors Corp., 721 F.2d 1152, 1156 (8th Cir. 1983) cert. denied, 476 U.S. 1170 (1986). The court finds that Plaintiff's claim of civil rights conspiracy meets the requirements of the Seventh Circuit, as noted in Sparkman, and also the notice pleading requirements of the Federal Rules of Civil Procedure.

Title VII Damages

Count IV of Plaintiff's complaint seeks redress for violation of Title VII of the Civil Rights Act of 1964. Count IV seeks damages of $1,000,000.00 plus costs and attorney's fees, as well as reinstatement, backpay, and retroactive seniority. Defendants correctly note that Seventh Circuit precedent bars this court from awarding punitive or compensatory damages in Title VII cases. Brooms v. Regal Tube Co., 881 F.2d 412, 423 (7th Cir. 1989). Therefore, the remedy which Plaintiff may seek for Title VII violations is limited to equitable relief.

The court dismisses the portion of Count IV of Plaintiff's complaint which seeks damages of $1,000,000.00. The court presumes that this sum represents Plaintiff's request for punitive or compensatory damages. The court grants Plaintiff leave to amend her complaint to demand the additional equitable relief of backpay. The court allows to stand as pleaded

the portion of Count IV of Plaintiff's complaint which requests an injunction against Defendants. A prevailing party in a Title VII action may, in the court's discretion, be awarded attorney's fees and costs. Brooms, 881 F.2d at 425. Thus, the court allows to stand as pleaded the portion of Count IV of Plaintiff's complaint which requests attorney's fees and costs.

Intentional Infliction of Emotional Distress

Defendants argue that, as a matter of law, Plaintiff has not stated a claim for intentional infliction of emotional distress, because 1) the alleged conduct is not extreme and outrageous, an essential element of the tort; and 2) the Illinois Workers' Compensation Act is the exclusive remedy for the tort. The court rejects both of these arguments.

Illinois law does recognize a cause of action for intentional infliction of emotional

distress. To state a claim for this tort, the plaintiff must plead and prove that the defendant intentionally engaged in extreme and outrageous conduct which caused the plaintiff to suffer sever emotional distress. Clay v. Quartet Mfg. Co., 644 F. Supp. 56, 61 (N.D. Ill. 1986), citing Public Finance Corp. v. Davis, 66 Ill. 2d 85, 360 N.E.2d 765 (1976). In Illinois, the extreme and outrageous nature of the conduct is an essential element of the tort. Baily v. Unocal Corp., 700 F. Supp. 396, 399 (N.D. Ill, 1988). The conduct must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency. Public Finance, 66 Ill. 2d at 88, 360 N.E.2d at 767. The relationship of the parties is an important factor in determining whether certain conduct is extreme and outrageous. Bailey, 700 F.Supp. at 399. If the defendant has abused or exploited a relationship, a lower threshold of liability applies. Id., citing Bahr v. Ellis & Robertson, Inc., 1985 WL 3074

(N.D. Ill. 1985).

As noted earlier in this Order, an unmarried woman's decision to bear and raise her child is a fundamental right. If Defendants did, as Plaintiff alleges, terminate her because of her status as an unmarried pregnant woman, then that conduct might be found to be outrageous and extreme. Further, the nature of and circumstances surrounding the "frequent negative comments and sayings" of other employees of Defendant Board might rise to the level of extreme and outrageous conduct. In any event, Plaintiff's allegations of intentional infliction of emotional distress are sufficiently pleaded to meet the liberal standard of notice pleading of the Federal Rules of Civil Procedure. Fed.R.Civ.P.8(a).

Defendants argue that the exclusivity provision of the Illinois Workers' Compensation Act, Ill. Rev. Stat. ch. 48, para. 138 - 138.30 (1989), bars Plaintiff's claim for intentional infliction of emotional distress. As support

for this position Defendants cite Brooms v. Regal Tube Co., 881 F.2d 412, 426 (7th Cir. 1989). Because this is an issue of interpretation of a state statute, this court must follow the state's highest court's ruling on the issue. Less than three months ago, the Illinois Supreme Court spoke to this very question in Meerbrey v. Marshall Field & Co., No. 69652 (Ill. S. Ct. Nov. 30, 1990) (1990 WL 186385). The Meerbrey court held that "[t]he exclusivity provisions [of the Illinois Workers' Compensation Act] will not bar a common law cause of action against an employer, however, for injuries which the employer or its alter ego intentionally inflicts upon an employee or which were commanded or expressly authorized by the employer." Id., slip op. at 7 (citing A. Larson, Law of Workmen's Compensation Section 68.21 (1988)).

In Count V of her complaint, Plaintiff has alleged that two intentional acts of Defendants caused her to suffer emotional distress: 1)

Defendants terminated her employment; and 2) Defendants allowed commentary and dialogue about Plaintiff to continue. The first act is necessarily not "accidental," and the second act might be shown to be not "accidental" on Defendants' part. Plaintiff may seek to prove that Defendants "commanded or expressly authorized" the negative comments or sayings made about Plaintiff by other of Defendants' employees. Such a showing would render Defendants' actions intentional. Thus, the two alleged acts are not conclusively within the exclusive purview of the Illinois Workers' Compensation Act. The court allows Count V of Plaintiff's complaint to stand as pleaded.

Qualified Immunity

Defendants argue that those among them named in their individual capacities are entitled to qualified immunity. The court rejects this argument. To establish personal, or individual, liability in a Section 1983

action, the plaintiff need show only that the officials, acting under color of state law, caused the deprivation of a federal right. Kentucky v. Graham, 473 U.S. 159, 166 (1985). If, as Plaintiff alleges, the individually named Defendants dismissed her based on her status as an unmarried pregnant woman, then they violated Plaintiff's substantive due process rights, and they would therefore have individual liability under Section 1983. Eckmann v. Board of Educ. of Hawthorn School Dist. No. 17, 636 F. Supp. 1214, 1225 (N.D. Ill. 1986). Plaintiff has alleged that all Defendants violated a clearly established constitutional right: the right of an unmarried woman to bear and raise her child. Such an allegation means that the defense of qualified immunity is not available to the individually named defendants. Id. at 1227. Therefore, the court refuses to dismiss the individually named defendants from this action.

Punitive Damages

Punitive damages may be awarded against the individually named defendants if they showed reckless or callous disregard of, or indifference to, Plaintiff's federally protected right to bear and raise her child. Smith v. Wade, 461 U.S. 30, 56 (1983). Therefore, the court allows to stand as pleaded Plaintiff's claim for punitive damages against the individually named defendants.

Governmental entities, including school boards, are immune from punitive damages for Section 1983 liability. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981). Further, the school board is a "local public entity" which, according to the Illinois Tort Immunity Act, is immune from punitive damages. Ill.Rev.Stat. ch. 85, para. 2-102 (1989). Therefore, the court dismisses all portions of Plaintiff's complaint which demand punitive damages against Defendant Board of Education.

Attorneys' Fees Under 42 U.S.C. Section 1988

As this Order has stated, Plaintiff has stated a cause of action against Defendants under 42 U.S.C. Sections 1983 and 1985 (1988). The prevailing party in a suit under either of these two sections may seek an award of attorneys' fees and costs. 42 U.S.C. Section 1988. Therefore, because the court is not dismissing Plaintiff's claims under Sections 1983 and 1985, it allows Plaintiff's claim for attorneys' fees and costs, under Section 1988, to stand as pleaded.

Conclusion

For the reasons set forth in this Order, the court grants in part and denies in part Defendants' motion to dismiss. The court dismisses the following portions of Plaintiff's complaint: allegations that Plaintiff was deprived of her liberty and property interests in employment without due process of law; allegations that Defendants violated

Plaintiff's first amendment rights; the request for damages of $1,000,000.00; and the request for punitive damages against Defendant Board of Education. Further, the court grants Plaintiff leave to file an amended complaint within thirty days, in accordance with this Order, regarding the following allegations: allegations that Plaintiff was deprived of her liberty and property interests in employment without due process of law; allegations that Defendants violated Plaintiff's first amendment rights; and the court grants Plaintiff leave to file an amended complaint to add a demand for the equitable relief of backpay. The court notes that the amended complaint should include all of Plaintiff's claims before the court. The amended complaint should incorporate the viable portions of Plaintiff's existing complaint with the amended portions which this

Order describes.

ENTER:

STANLEY J. ROSZKOWSKI, JUDGE
UNITED STATES DISTRICT COURT

DATED: February 12, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

LINDA WHITMORE, Plaintiff,	)	
v.	)	No. 90-C-20143
BOARD OF EDUCATION OF DEKALB COMMUNITY SCHOOL DISTRICT NO. 428, JOHN REY, President of the Board of Education School District No. 428, Individually, BERNARD LOONEY, Principal, Individually, DR. JACK DEERE, District Superintendent, Individually, KEN KENNEDY, Assistant Principal, Individually, and ROBERT WILLIAMS, Assistant Superintendent, Individually,	)	Dated:May 29, 1991
Defendants.	)	

AMENDED ORDER

Before the court is Defendants' motion to dismiss Plaintiff's complaint. For the reasons set forth in this Order, the court grants in part and denies in part Defendants' motion. Further, the court grants Plaintiff leave to

file an amended complaint within thirty days in accordance with this Order.

BACKGROUND

On May 15, 1990, Plaintiff, Linda Whitmore, filed a complaint in this court against the following Defendants: Board of Education of DeKalb Community School District No. 428 (hereinafter "Board"); and, in their individual capacities, Board President John Rey, Principal Bernard Looney, District Superintendent Dr. Jack Deere, Assistant Principal Ken Kennedy, and Assistant Superintendent Robert William. Plaintiff alleges a cause of action against Defendants under 42 U.S.C. Sections 1983, 1985, 1988 (1988), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e - 2000h (1988), and also a state law claim of intentional infliction of emotional distress.

The following information is taken from Plaintiff's complaint. Defendant Board employed Plaintiff as a full-time high school teacher form the fall 1987 semester until 1989. In July

1988, Plaintiff was raped and became pregnant as a result of the rape. In November 1988 Plaintiff informed Principal Looney of the rape and pregnancy. Assistant Principal Kennedy and Principal Looney evaluated Plaintiff's teaching performance on three occasions: November 23, 1988; January 6, 1989; and March 2, 1989. In the first two evaluations, Plaintiff was rated in the excellent to superior range, and in the third evaluation she was rated in the satisfactory to excellent range.

On or about March 19, 1989, the Board adopted and passed a resolution dismissing Plaintiff from her employment. On March 29, 1989, Plaintiff was notified of her termination through a letter from Board President Rey. This letter stated that Plaintiff was being terminated because the performance of her duties had failed to meet the District's expectations. On that date, Plaintiff was nine months pregnant and unmarried. Plaintiff was able to secure other employment as a teacher after repeated

efforts over a long period of time.

DISCUSSION

In analyzing a motion to dismiss, this court will not dismiss a complaint unless it is clear there are no set of facts that Plaintiffs could prove consistent with the pleadings that would entitle them to relief. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Murphy v. Lane, 833 F.2d 106, 107 (7th Cir. 1087); Vaden v. Village of Maywood, 809 F.2d 361, 363 (7th Cir.), cert. denied, 482 U.S. 908 (1987). The court will accept all well-pleaded factual allegations in the complaint as true. Vaden, 809 F.2d at 363; Doe v. St. Joseph's Hosp. of Fort Wayne, 788 F.2d 411, 414 (7th Cir. 1986). In addition, this court will view the allegations in a light most favorable to the non-moving party. Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984), cert. denied, 470 U.S. 1054 (1985); Wolfolk v. Rivera, 729 F.2d 1114, 1116 (7th Cir. 1984).

Statute of Limitations

Defendants filed their motion to dismiss on July 5, 1990. Defendants advance several arguments in support of their motion, the first of which is that Plaintiff's complaint is barred by the statute of limitations. Defendants argue that the one-year statute of limitations found in the Illinois Tort Immunity Act applies. Ill.Rev. Stat. ch. 85, para. 8-101 (1989). The Supreme Court's ruling in Owens v. Okure, 109 S. Ct. 153 (1989), is the final word on the statute of limitations for Section 1983 actions. The Owens court stated:

> We accordingly hold that where state law provides multiple statutes of limitations for personal injury actions, courts considering Section 1983 claims should borrow the general or residual statute for personal injury actions.

Id. at 582 _____, 109 S. Ct. at 582.

Therefore, Section 1983 actions brought in

Illinois are subject to the one general statute of limitations for personal injury actions. The Seventh Circuit has ruled that Illinois's two-year statute of limitations for personal injury applies to Section 1983 actions brought in Illinois. Kalimara v. Illinois Dep't of Corrections, 879 F.2d 276, 277 (7th Cir. 1989). The Illinois Code of Civil Procedure provides that personal injury actions shall be brought within two years after the cause of action accrued. Ill. Rev. Stat. ch. 110, para. 13-202 (1989). The court finds that Plaintiff's claims under 42 U.S.C. Sections 1985 and 1988, because they relate to and depend upon, respectively, Plaintiff's Section 1983 claims, are also subject to the two-year statute of limitations.

Defendant does not specifically argue that Plaintiff's Title VII claim is also barred by the statute of limitations. Therefore, the court need not address the timeliness of

Plaintiff's Title VII claim.[3] Defendant does contend that Plaintiff's pendent state claim for intentional infliction of emotional distress was not timely filed. Defendant implies that the statute of limitations began to run for this claim on March 20, 1989, the date Plaintiff says she received notice of termination from Defendants. Therefore, Defendants argue, Plaintiff missed the one-year statute of limitations because she filed suit on May 15, 1990.

The court rejects Defendants' argument. Plaintiff's pendent state claim alleges an intentional tort: intentional infliction of emotional distress. Plaintiff alleges that Defendants committed this tort by terminating her, and also because "[a]s a direct result of the said dismissal, Plaintiff became the

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[3]In Illinois, persons complaining of Title VII violations must file discrimination charges with the Illinois Department of Human Relations within 180 days of the discriminatory act. Haag v. Board of Education, 655 F. Supp. 1267, 1270 (N.D. Ill. 1987).

subject of frequent and negative comments and sayings by other employees of Defendant Board." Plaintiff's complaint, filed May 15, 1990, at 11. The Seventh Circuit has ruled that the statute of limitations does not begin to run for a continuing wrong until the wrong is finished. Taylor v. Meirick, 712 F.2d 1112, 1118 (7th Cir. 1983). Where a tort involves repeated injury, the statute of limitations begins to run on the date of the last injury, or when the tortious activity ends. Gass v. Metro-East Sanitary Dist., 186 Ill. App. 3d 1077, _____, 542 N.E. 2d 1229, 1234, appeal denied, 128 Ill. 2d 663, 548 N.E.2d 1068 (1989). It is reasonable to infer that Plaintiff is alleging that the emotional distress she suffered was a continuing injury, which did not end on March 20, 1989, and that the "frequent and negative comments and sayings" about her extended past that date. Therefore, the court finds that Plaintiff filed her pendent state law claim within the one-

year statute of limitations of the Illinois Tort Immunity Act.

Employment Status

Defendants argue that Plaintiff had no property or liberty interest in continued employment because she was a nontenured, probationary teacher at the time of her dismissal. Defendants allege that the letter informing Plaintiff of her dismissal complied with the requirements of the Illinois School Code of 1961. The relevant portion of the School Code reads:

> Any teacher who has been employed in any district as a full-time teacher for a probationary period of 2 consecutive school terms shall enter upon contractual continued service unless given written notice of dismissal stating the specific reason therefor, by certified mail, return receipt requested by the employing board at least 60 days before the end of such period.

Ill. Rev. Stat. ch. 122, para. 24-11 (1989) (emphasis added).

According to Plaintiff, Defendant Rey's letter to her "stated that the reason for the

discharge was, 'the performance' of your duties has failed to meet the District's expectations." Plaintiff's complaint at 5. One Illinois appellate court defined "specific reason", under the portion of the School Code quoted above, as a reason which fairly apprises the teacher of the alleged deficiency upon which the dismissal is based, and which is sufficiently specific for the teacher to be able to refute the charge. Wade v. Grantie City Community Unit School Dist. No. 9, 71 Ill. App. 2d 34, 36, 218 N.E.2d 19, _____ (1966).

Another Illinois appellate court found to be sufficiently specific a dismissal letter giving the reason "your inability to adequately supervise employees under your control." Howard v. Board of Educ. of Freeport School Dist. No. 145, 160 Ill. App. 3d 309, ____, 513 N.E.2d 545, 547 (1987). The court noted that this notice was sufficient because it "contained a specific reference to plaintiff's supervisory duties", and also because the

plaintiff had been advised of his specific performance deficiencies on numerous occasions. Id. at _____, 513 N.E.2d at 547-48. Here, Plaintiff's notice of dismissal made no reference to specific performance deficiencies; further, she had not been advised of any specific deficiencies prior to her dismissal. Therefore, the "reason" given Plaintiff contains none of the specificity required under Wade and Howard. The court finds that Plaintiff has sufficiently alleged that Defendants did not give Plaintiff sufficiently specific reasons for her termination, contrary to the requirements of the School Code. Plaintiff has sufficiently alleged 1) that she was under continued contractual service as of the last day of her employment, and 2) that she had a protectable property interest in employment.

Property and Liberty Interests in Employment

As just noted, Plaintiff has alleged that she was no longer a probationary teacher at the end

was no longer a probationary teacher at the end of her employment with Defendant Board. Therefore, Plaintiff has alleged that she possessed a property interest in continued employment as a teacher by virtue of the Illinois School Code, Ill. Rev. Stat. ch. 122, para, 24-11 (1989).

To show that she has been denied procedural due process, Plaintiff must allege that she was denied notice and/or an opportunity for a hearing, the two elements which are the essence of procedural due process. The court dismisses the portions of Plaintiff's complaint which allege that she was deprived of her property interest in employment without due process of law. However, the court grants Plaintiff leave to amend her complaint to allege specifically how she was denied notice and/or opportunity for a hearing regarding her dismissal.

Plaintiff also claims that Defendants deprived her of liberty interest in employment. The Seventh Circuit has held that only a

dismissal that is accompanied by serious public charges of misconduct preventing the employee from obtaining other employment of comparable responsibility may deprive the employee of his or her liberty interest in employment. Jungels v. Pierce, 825 F.2d 1127, 1131 (7th Cir. 1987).

Plaintiff's allegations regarding her liberty interest in employment do not state that the reason for her dismissal was made public, nor that the reason given was a serious charge of misconduct. Plaintiff alleges only that because Defendants dismissed her, she was unable to secure other employment as a teacher for a long period of time. Therefore, Plaintiff has not met the Jungels test for deprivation of liberty. Accordingly, the court dismisses the portions of Plaintiff's complaint that allege deprivation of liberty interest without due process of law. However, the court grants Plaintiff leave to amend her complaint in accordance with the test in Jungels v. Pierce, 825 F.2d 1127 (7th Cir. 1987).

Equal Protection

Defendants argue that Plaintiff has failed to state a Section 1983 claim for denial of equal protection. A person may state a claim for denial of equal protection by alleging that the government has infringed on a fundamental right. Supreme Court precedent clearly shows that a person's decisions regarding marriage and child bearing represent fundamental rights which are constitutionally protected from improper state infringement. Paul v. Davis, 424 U.S. 645, 713 (1976) ("matters relating to marriage, procreation, contraception, family relationships, and child rearing and education" are constitutionally protected); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (the right of privacy includes the right of persons, whether married or single, to decide whether to bear children). This court has noted that without question, an unmarried woman has a substantive due process right to conceive and

raise her child without unwarranted state intrusion. Eckmann v. Board of Educ. of Hawthorn School Dist. No. 17, 636 F. Supp. 1214, 1218 (N.D. Ill. 1986). Therefore, Plaintiff, an unmarried woman who chose to bear and raise her child, has sufficiently pleaded a claim for denial of equal protection.

Violations of the Bill of Rights

Plaintiff has pleaded that Defendants have deprived her of her rights under the first, fourth, fifth, sixth, ninth, tenth, and fourteenth amendments. In her answer brief to Defendants' motion to dismiss, Plaintiff concedes that the fourth, sixth, and tenth amendments are inapplicable. Therefore, the court dismisses the portions of Plaintiff's complaint which allege a cause of action under the fourth, sixth, and tenth amendments to the U.S. Constitution.

Plaintiff's complaint does not identify in what particular way Defendants violated her

rights under the remaining constitutional amendments. Rather, Plaintiff states only generally that Defendants:

> have acted under color of State Law to wrongfully invade WHITMORE'S private life and otherwise to deprive her of her right to privacy free from governmental interference guaranteed by the 1st, 4th, 5th, 6th, 9th, 10th, and 14th Amendments to the Constitution of the United States, and by the Constitution of the State of Illinois.

Plaintiff's complaint at 6.

The only portion of the first amendment which the court can conceive of as applicable is the right "to petition the Government for a redress of grievances." U.S. Const. amend. I. Plaintiff has nowhere alleged that she requested and was denied the opportunity for a hearing concerning her dismissal. The first amendment has been found to confer a right to privacy in speech or association, but not in matters of freedom of choice in the matters of family and marriage. Thus, the court finds that Plaintiff has failed to state a claim under the first amendment. Accordingly, the

court dismisses those portions of Plaintiff's complaint which state a cause of action based on the first amendment to the U.S. Constitution. However, as noted on page 7 of this Order, the court grants Plaintiff leave to amend her complaint to allege that she requested and was denied the opportunity for a hearing regarding her termination.

Plaintiff has alleged that Defendants deprived her of a recognized substantive due process right: the right of an unmarried woman to bear and raise a child out of wedlock. The grand jury clause is the only clause in the fifth amendment which the Supreme Court has specifically held is not incorporated into the fourteenth amendment. Therefore, Plaintiff can properly allege that her substantive due process right emanates from the fifth and fourteenth amendments. Further, as described in the above section on Equal Protection, Plaintiff has properly pleaded a cause of action under the equal protection clause of the

fourteenth amendment.

Defendants argue that the ninth amendment is inapplicable because they dismissed Plaintiff on the basis of her teaching performance, and not because of her condition as a pregnant unmarried woman. This is an argument on the merits of Plaintiff's claim, and not an explanation of why the ninth amendment is inapplicable. For the purpose of this motion to dismiss, the court must assume that Plaintiff's allegations are true. If they are true, then Plaintiff has a cause of action under the ninth amendment right to familial privacy, as articulated in Griswold v. Connecticut, 381 U.S. 479, 484 (1965). Plaintiff asserts the right to decide the composition of her own family; in other words, her decision not to marry, and to raise a child.

Conspiracy under 42 U.S.C. Section 1985

Evidence of a conspiracy is rarely proven

directly, and is often proven by circumstantial evidence. Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979), rev'd in part on other grounds, 446 U.S. 754 (1980). However, to survive a motion to dismiss, a claim of civil rights conspiracy must be sufficiently specific. Conclusory allegations alone are insufficient; if they are part of the claim, they must at least be accompanied by supporting factual allegations. Sparkman v. McFarlin, 601 F.2d 261, 265-66 (7th Cir. 1979) (Sprecher, J., concurring), citing Hansen v. Ahlgrimm, 520 F.2d 768 (7th Cir. 1975), and other Seventh Circuit cases so holding.

Plaintiff has alleged that Defendants acted in concert to deprive Plaintiff of equal protection through dismissing her. The concept of intracorporate immunity is inapplicable because Defendant Board has not shown that it is a corporation; because the other Defendants are named in their individual capacities; and because, even if Defendant Board were a

corporation, the individual employees of Defendant Board are named as co-conspirators. Cross v. General Motors Corp., 721 F.2d 1152, 1156 (8th Cir. 1983) cert. denied, 476 U.S. 1170 (1986). The court finds that Plaintiff's claim of civil rights conspiracy meets the requirements of the Seventh Circuit, as noted in Sparkman, and also the notice pleading requirements of the Federal Rules of Civil Procedure.

Title VII Damages

Count IV of Plaintiff's complaint seeks redress for violation of Title VII of the Civil Rights Act of 1964. Count IV seeks damages of $1,000,000.00 plus costs and attorney's fees, as well as reinstatement, backpay, and retroactive seniority. Defendants correctly note that Seventh Circuit precedent bars this court from awarding punitive or compensatory damages in Title VII cases. Brooms v. Regal Tube Co., 881 F.2d 412, 423 (7th Cir. 1989).

Therefore, the remedy which Plaintiff may seek for Title VII violations is limited to equitable relief.

The court dismisses the portion of Count IV of Plaintiff's complaint which seeks damages of $1,000,000.00. The court presumes that this sum represents Plaintiff's request for punitive or compensatory damages. The court grants Plaintiff leave to amend her complaint to demand the additional equitable relief of backpay. The court allows to stand as pleaded the portion of Count IV of Plaintiff's complaint which requests an injunction against Defendants. A prevailing party in a Title VII action may, in the court's discretion, be awarded attorney's fees and costs. Brooms, 881 F.2d at 425. Thus, the court allows to stand as pleaded the portion of Count IV of Plaintiff's complaint which requests attorney's fees and costs.

Intentional Infliction of Emotional Distress

Defendants argue that, as a matter of law,

Plaintiff has not stated a claim for intentional infliction of emotional distress, because 1) the alleged conduct is not extreme and outrageous, an essential element of the tort; and 2) the Illinois Workers' Compensation Act is the exclusive remedy for the tort. The court rejects both of these arguments.

Illinois law does recognize a cause of action for intentional infliction of emotional distress. To state a claim for this tort, the plaintiff must plead and prove that the defendant intentionally engaged in extreme and outrageous conduct which caused the plaintiff to suffer sever emotional distress. Clay v. Quartet Mfg. Co., 644 F. Supp. 56, 61 (N.D. Ill. 1986), citing Public Finance Corp. v. Davis, 66 Ill. 2d 85, 360 N.E.2d 765 (1976). In Illinois, the extreme and outrageous nature of the conduct is an essential element of the tort. Baily v. Unocal Corp., 700 F. Supp. 396, 399 (N.D. Ill, 1988). The conduct must be so

outrageous in character and so extreme in degree as to go beyond all possible bounds of decency. Public Finance, 66 Ill. 2d at 88, 360 N.E.2d at 767. The relationship of the parties is an important factor in determining whether certain conduct is extreme and outrageous. Bailey, 700 F.Supp. at 399. If the defendant has abused or exploited a relationship, a lower threshold of liability applies. Id., citing Bahr v. Ellis & Robertson, Inc., 1985 WL 3074 (N.D. Ill. 1985).

As noted earlier in this Order, an unmarried woman's decision to bear and raise her child is a fundamental right. If Defendants did, as Plaintiff alleges, terminate her because of her status as an unmarried pregnant woman, then that conduct might be found to be outrageous and extreme. Further, the nature of and circumstances surrounding the "frequent negative comments and sayings" of other employees of Defendant Board might rise to the level of extreme and outrageous conduct. In

any event, Plaintiff's allegations of intentional infliction of emotional distress are sufficiently pleaded to meet the liberal standard of notice pleading of the Federal Rules of Civil Procedure. Fed.R.Civ.P.8(a).

Defendants argue that the exclusivity provision of the Illinois Workers' Compensation Act, Ill. Rev. Stat. ch. 48, para. 138 - 138.30 (1989), bars Plaintiff's claim for intentional infliction of emotional distress. As support for this position Defendants cite Brooms v. Regal Tube Co., 881 F.2d 412, 426 (7th Cir. 1989). Because this is an issue of interpretation of a state statute, this court must follow the state's highest court's ruling on the issue. Less than three months ago, the Illinois Supreme Court spoke to this very question in Meerbrey v. Marshall Field & Co., No. 69652 (Ill. S. Ct. Nov. 30, 1990) (1990 WL 186385). The Meerbrey court held that "[t]he exclusivity provisions [of the Illinois Workers' Compensation Act] will not bar a

common law cause of action against an employer, however, for injuries which the employer or its alter ego intentionally inflicts upon an employee or which were commanded or expressly authorized by the employer." Id., slip op. at 7 (citing A. Larson, Law of Workmen's Compensation Section 68.21 (1988)).

In Count V of her complaint, Plaintiff has alleged that two intentional acts of Defendants caused her to suffer emotional distress: 1) Defendants terminated her employment; and 2) Defendants allowed commentary and dialogue about Plaintiff to continue. The first act is necessarily not "accidental," and the second act might be shown to be not "accidental" on Defendants' part. Plaintiff may seek to prove that Defendants "commanded or expressly authorized" the negative comments or sayings made about Plaintiff by other of Defendants' employees. Such a showing would render Defendants' actions intentional. Thus, the two alleged acts are not conclusively within the

exclusive purview of the Illinois Workers' Compensation Act. The court allows Count V of Plaintiff's complaint to stand as pleaded.

Qualified Immunity

Defendants argue that those among them named in their individual capacities are entitled to qualified immunity. The court rejects this argument. To establish personal, or individual, liability in a Section 1983 action, the plaintiff need show only that the officials, acting under color of state law, caused the deprivation of a federal right. Kentucky v. Graham, 473 U.S. 159, 166 (1985). If, as Plaintiff alleges, the individually named Defendants dismissed her based on her status as an unmarried pregnant woman, then they violated Plaintiff's substantive due process rights, and they would therefore have individual liability under Section 1983. Eckmann v. Board of Educ. of Hawthorn School Dist. No. 17, 636 F. Supp. 1214, 1225 (N.D.

Ill. 1986). Plaintiff has alleged that all Defendants violated a clearly established constitutional right: the right of an unmarried woman to bear and raise her child. Such an allegation means that the defense of qualified immunity is not available to the individually named defendants. Id. at 1227. Therefore, the court refuses to dismiss the individually named defendants from this action.

Punitive Damages

Punitive damages may be awarded against the individually named defendants if they showed reckless or callous disregard of, or indifference to, Plaintiff's federally protected right to bear and raise her child. Smith v. Wade, 461 U.S. 30, 56 (1983). Therefore, the court allows to stand as pleaded Plaintiff's claim for punitive damages against the individually named defendants.

Governmental entities, including school boards, are immune from punitive damages for

Section 1983 liability. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981). Further, the school board is a "local public entity" which, according to the Illinois Tort Immunity Act, is immune from punitive damages. Ill.Rev.Stat. ch. 85, para. 2-102 (1989). Therefore, the court dismisses all portions of Plaintiff's complaint which demand punitive damages against Defendant Board of Education.

Attorneys' Fees Under 42 U.S.C. Section 1988

As this Order has stated, Plaintiff has stated a cause of action against Defendants under 42 U.S.C. Sections 1983 and 1985 (1988). The prevailing party in a suit under either of these two sections may seek an award of attorneys' fees and costs. 42 U.S.C. Section 1988. Therefore, because the court is not dismissing Plaintiff's claims under Sections 1983 and 1985, it allows Plaintiff's claim for attorneys' fees and costs, under Section 1988, to stand as pleaded.

Conclusion

For the reasons set forth in this Order, the court grants in part and denies in part Defendants' motion to dismiss. The court dismisses the following portions of Plaintiff's complaint: allegations that Plaintiff was deprived of her liberty and property interests in employment without due process of law; allegations that Defendants violated Plaintiff's first amendment rights; the request for damages of $1,000,000.00; and the request for punitive damages against Defendant Board of Education. Further, the court grants Plaintiff leave to file an amended complaint within thirty days, in accordance with this Order, regarding the following allegations: allegations that Plaintiff was deprived of her liberty and property interests in employment without due process of law; allegations that Defendants violated Plaintiff's first amendment rights; and the court grants Plaintiff leave to

file an amended complaint to add a demand for the equitable relief of backpay. The court notes that the amended complaint should include all of Plaintiff's claims before the court. The amended complaint should incorporate the viable portions of Plaintiff's existing complaint with the amended portions which this Order describes.

ENTER:

STANLEY J. ROSZKOWSKI, JUDGE
UNITED STATES DISTRICT COURT

DATED: May 20, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

LINDA WHITMORE, Plaintiff,	)	
v.	)	No. 90-C-20143
BOARD OF EDUCATION OF DEKALB COMMUNITY SCHOOL DISTRICT NO. 428, JOHN REY, President of the Board of Education School District No. 428, Individually, BERNARD LOONEY, Principal, Individually, DR. JACK DEERE, District Superintendent, Individually, KEN KENNEDY, Assistant Principal, Individually, and ROBERT WILLIAMS, Assistant Superintendent, Individually,	)	Dated:March 18, 1992
Defendants.	)	

ORDER

Introduction

Linda Whitmore, plaintiff, filed a second amended complaint against defendants: the Board of Education of DeKalb Community School District No. 428; John Rey, president of the Board of Education; Bernard Looney, principal; Jack

Deere, district superintendent; Ken Kennedy, assistant principal; and Robert Williams, assistant superintendent. The second amended complaint contains five counts. All five counts arise from defendant's dismissal of plaintiff as a high school teacher. Count I is brought pursuant to 42 U.S.C. §1983 alleging defendants violated plaintiff's constitutional rights of equal protection nd both substantive and procedural due process. Count I seeks punitive damages based on the §1983 claim. Count III alleges a violation of 42 U.S.C. §1985. Count IV claims that defendants violated 42 U.S.C. §2000e (Title VII) by discharging plaintiff based on her sex. Count V alleges intentional infliction of emotional distress. Defendants filed a motion for summary judgment, and plaintiff filed a cross-motion for partial summary judgment.

Facts

Plaintiff is a female teacher who was hired to teach at DeKalb High School beginning the

fall semester of 1987. Plaintiff received two successive annual contracts which ran from the fall of 1987 to the end of school term in June of 1989. When plaintiff accepted employment, she was aware that a two-year probationary period existed.

Between November 1987 and March 1989, plaintiff was evaluated six times. Ken Kennedy, the assistant principal, evaluated plaintiff four of the six times, and Bernard Looney, the principal, evaluated plaintiff on the other two occasions. Plaintiff received a copy of an evaluation form and later attended a meeting which explained the evaluation process. The ratings on the form were the following: 4 (superior), 3 (excellent), 2 (satisfactory) and 1 (unsatisfactory). According to Jack Deere, the district superintendent, the process was inflated so that a satisfactory rating actually meant that a teacher was not doing well. Each of plaintiff's six evaluations consisted of a pre-evaluation conference, a classroom

observation and a post-observation conference.

During several of the post-observation conferences, plaintiff was informed of a perceived lack of enthusiasm. After the second evaluation, a comment under the heading "summative rating" stated, "Due to improvement in delivery and planning I feel that a rating in the high satisfactory range is appropriate at this time, with the continued improvement a future excellent rating is a definite possibility." (Emphasis in original.) After plaintiff's third evaluation, she was rehired for the next academic year. After the fifth evaluation, the summative rating comment stated, "Linda continues to strive for improvement. Based upon this class observation, an excellent rating would be appropriate." Following the sixth and final evaluation, the summative rating comment stated, "Satisfactory to Excellent Rating."

On March 23, 1989, at the post-observation conference of the sixth evaluation, Looney told

plaintiff that he would not recommend that she be retained and given tenure because she did not meet the Board's expectations. Plaintiff received a letter dated March 20, 1989, notifying her that she was dismissed from her duties as a school teacher effective the last day of the school term. The letter stated, "This action is being taken because the performance of your duties has failed to meet the District's expectations." In addition to plaintiff, another teacher, Sandy Larkin, was not recommend for tenure, and Larkin's final evaluation was better than plaintiff's.

In June 1988, plaintiff became pregnant as a result of a rape. In November 1988, plaintiff informed Looney of the rape and pregnancy. After receiving notice of her termination, plaintiff and her mother met with Deere. At the meeting, Deere referred to plaintiff's pregnancy and said he had empathy and sympathy for plaintiff's mother. Plaintiff had personal knowledge of only one negative comment regarding

her pregnancy and that comment was made by Ms. Helen Farley who is not a defendant in this case. The statement plaintiff alleges that Helen Farley made was, "That there was something wrong with that special education staff and all of its promiscuous teachers, they got one unmarried and pregnant and another running around." Plaintiff never head any defendant make a negative comment about her pregnancy, and no defendant suggested that she seek an abortion, resign before her pregnancy showed or that she give up her child for adoption. In March 1989, Ester Solar, who was also pregnant at the time, was given tenure.

Contentions

Defendants contend as to Count I that they followed the proper procedures for terminating plaintiff under the Illinois statute, Ill.Rev. Stat. ch. 122, par. 24-11 (1989). By following the proper statutory procedures, defendants claim that plaintiff had no property interest under the Fourteenth Amendment in remaining

employed. Defendants also contend that there is no evidence showing a violation of plaintiff's other constitutional rights, and there is no evidence of intentional discrimination so as to violate the equal protection clause of the Fourteenth Amendment. As to plaintiff's §1985 claim in Count III, defendants contend that it is barred by the intracorporate conspiracy doctrine. Defendants also contend that plaintiff has failed to meet her prima facie case under her Title VII claim in Count IV. Finally, defendants contend that plaintiff in Count V has failed to show that defendants' conduct was extreme and outrageous as required for an intentional infliction of emotional distress claim.

In plaintiff's cross-motion for partial summary judgment, she contends that she was a tenured teacher as a matter of law because defendants failed to comply with the statutory requirements; namely, they failed to give her a "specific reason" for her dismissal. As a

tenured teacher, plaintiff contends that she was entitled to certain protections under the Fourteenth Amendment.

Discussion

This court will not grant any summary judgment motion unless all of the pleadings and supporting documents, if any, indicate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 147 (1986); Fitzsimmons v. Best, 528 F.2d 692, 694 (7th Cir. 1976). Facts are material so as to preclude summary judgment if they might affect the outcome of the suit under the governing law. Anderson, 477 U.S. at 248. A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson, 477 U.S. at 248. However, the district court is not required to evaluate every conceivable inference that can be drawn from evidentiary matters, but

only reasonable ones. Spring v. Sheboygan Area School District, 865 F.2d 883, 886 (7th Cir. 1989). To demonstrate a genuine issue of material fact in opposition to a motion for summary judgment, the non-moving party must do more than raise a "metaphysical doubt" as to the material facts. Matsushita Electric Industrial Co., v. Zenith Radio Co., 475 U.S. 574, 586 (1986). The mere existence of a scintilla of evidence in support of a party's position is insufficient; there must be evidence on which the jury could reasonably find for the party. Anderson, 477 U. S. at 252. The inquiry to be made on a motion for summary judgment is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Anderson, 477 U. S. at 251-52.

Count I[4]

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[4] Included in Count I of plaintiff's second amended complaint are allegations which are legally and factually incorrect. For example, plaintiff has alleged that defendants, a local government body and its employees,

Plaintiff's main thrust in Count I is that she was a tenured teacher. She contends she was dismissed contrary to the Illinois statute governing such action because defendants failed to give plaintiff a specific reason for her dismissal. See Ill. Rev. Stat., ch. 122, par. 24-11 (1989). Plaintiff contends that as a tenured teacher she had a property interest

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violated the Fifth Amendment's due process clause. Without belaboring the point, it is noted that the Fifth Amendment's due process clause applies to the Federal government. See Barron v. Baltimore, 32 U.S. 243 (1833). Also included in Count I are allegations that defendants violated the Illinois constitution; however, claims under §1983 must be based on deprivations of rights secured by the Federal Constitution or Federal laws. Flagg Brothers, Inc. v. Brooks, 436 U. S. 149, 155 (1978); Tavarez v. O'Malley, 826 F.2d 671, 677 (7th Cir. 1987). These allegations are so contrary to clearly established law that they need no discussion.

Further, some of plaintiff's factual allegations in Count I are contrary to plaintiff's own deposition testimony. Plaintiff alleged that she was "unable to obtain employment for a long period of time." However, plaintiff testified in her deposition that during the summer of 1989 she held the same teaching position which she had held for every summer for 16 years, and she also started working as a special education teacher in August 1989.

which could not be deprived without due process. Defendants contend that plaintiff was dismissed in accordance with the Illinois statute, and therefore, she had no property interest as a nontenured teacher.

Property interests are not create by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). In this cause of action, plaintiff attempts to create a property interest under §24-11 of the Illinois School Code (Code). Ill. Rev. Stat., ch. 122, par. 24-11 (1989). If plaintiff was a tenured teacher, she would be entitled to the protections of the Fourteenth Amendment. However, the Seventh Circuit has held that under §24-11 of the Code nontenured teachers' claims of entitlement to their positions are insufficient to constitute a property interest within the meaning of the

Fourteenth Amendment. Miller v. School District Number 167, Cook County, Illinois, 500 F.2d 711, 712 (7th Cir. 1974); see also Austin v. Board of Education of Georgetown Community Unit School District No. 3, 562 F.2d 446, 452 (7th Cir. 1977). Thus, plaintiff's entire property interest is premised on whether she was a tenured teacher because she was not properly dismissed according to §24-11 of the Code.

Section 24-11 of the Code provides the following:

> "Any teacher who has been employed in any district as a full-time teacher for a probationary period of 2 consecutive school terms shall enter upon contractual continued service unless given written notice of dismissal stating the specific reason therefor, by certified mail, return receipt required by the employing board at least 60 days before the end of such period."

Ill. Rev. Stat., ch. 122, par. 24-11 (1989).

The term "specific reason" means that the reason "must fairly apprise the teacher of the alleged deficiency upon which the employer-school board bases its dismissal action, and with sufficient specificity to enable the teacher to refute the charge." Howard v. Board of Education of Freeport, 160 Ill.App.3d 309, 513 N.E.2d 545, 547 (1987). The purpose of the specificity requirement is to prevent arbitrary dismissals which state vague or nebulous reasons or no reasons at all, and to compel school boards to state the actual reason for the dismissal. Burns v. Board of Education of Fairfield School District No. 112 of Wayne County, 47 Ill.App.3d 589, 362 N.E.2d 353, 355 (1977). Prior evaluations before the dismissal which give notice of perceived deficiencies may help fulfill the statutory requirement of a specific reason. See Howard, 160 Ill.App.3d at _____, 513 N.E.2d at 548.

Based on the prior evaluations of plaintiff and the notice she received in those

evaluations of the perceived deficiencies, defendants met their statutory requirement that plaintiff receive a specific reason for her dismissal. Although the March 20, 1989, letter merely stated that plaintiff was dismissed because she "failed to meet the District's expectations," she was repeatedly told during her evaluations that her lack of enthusiasm was a problem which needed to be corrected. When considered in conjunction with the prior evaluations, the March 20, 1989, letter fairly apprised plaintiff as to why she was being dismissed and fulfilled the purpose of the statute. This is sufficient to meet the "specific reason" requirement of §24-11. See Howard, 160 Ill.App.3d at ____, 513 N.E.2d at 548.

Because plaintiff was dismissed in accordance with the Illinois statute, plaintiff has no property interest protected by the Fourteenth Amendment. See Miller, 500 F.2d at 712; see also Roth, 408 U.S. at 578. Therefore,

plaintiff's cross-motion for partial summary judgment is denied.

Count I also alleges other violations of plaintiff's constitutional rights including what appears to be a claim that she was deprived of a liberty interest without due process of law in violation of the Fourteenth Amendment, a claim that she was deprived of substantive due process and a claim that she was denied equal protection under the Fourteenth Amendment.

As to the contention that she was deprived of a liberty interest without due process of law, the general rule is that for a person to be deprived of a liberty interest in continued employment the discharge must affect the reputation, good name, honor or integrity of the person. See Roth, 408 U. S. at 573. However, in some circumstances, a combination of stigma to reputation plus failure to rehire may state a claim under 42 U.S.C. §1983. Austin, 562 F.2d at 450. although some stigma

attaches whenever an employee is dismissed, this type of harm does not infringe on an employee's liberty interests. Ratliff v. City of Milwaukee, 795, F.2d 612, 625 (7th Cir. 1986). Here, plaintiff was dismissed because she did not meet the expectations of defendants based on the lack of enthusiasm. The dismissal was not based on allegations of misconduct such as taking indecent liberties with a minor. Cf. Austin, 562 F.2d at 450. The failure to rehire plaintiff did not deprive her of a protected liberty interest.

As to plaintiff's substantive due process claim, because there was no violation of plaintiff's procedural due process rights to property and liberty, plaintiff's substantive due process claim must also fail. See Stebbins v. Weaver, 537 F.2d 939, 942 (7th Cir. 1976).

Next, in analyzing plaintiff's equal protection claim, it must first be determined whether the claim involves a suspect class or a fundamental right. Pryor v. Brennan, 914

F.2d 921, 923 (7th Cir. 1990). It appears in Count I that plaintiff is claiming both that she is member of a suspect class, her sex, and that the claim involves a fundamental right, her decision to bear and rear a child.

To establish a prima facie case of discrimination in violation of the equal protection clause, a plaintiff is required to show that he or she is a member of a protected class, that he or she is otherwise similarly situated to members of the unprotected class and that he or she was treated differently from members of the unprotected class. McMillian v. Svetanoff, 878 F.2d 186, 189 (7th Cir. 1989). In showing a prima facie violation of equal protection, the plaintiff must show both differential treatment and discriminatory intent. Sims v. Mulcahy, 902 F.2d 524, 539 (7th Cir. 1990).

Plaintiff has failed to establish a prima facie case of an equal protection violation under §1983 in order to prevent summary

judgment. See Randle v. LaSalle Telecommunications, Inc., 876 F.2d 563, 568 (7th Cir. 1989). Plaintiff has not produced any showing that she was intentionally treated differently because of her sex or her pregnancy. In fact, another pregnant women was given tenure at the time plaintiff received notice that she would not be given tenure.

For the foregoing reasons, as to Count I of plaintiff's second amended complaint, defendant's motion for summary judgment is granted and plaintiff's cross-motion for partial summary judgment is denied.

Count II

Because Count II requests punitive damages based on Count I and defendants' motion for summary judgment as to Count I is granted and plaintiff's cross-motion for partial summary judgment is denied, defendants' motion for summary judgment as to Count II is granted.

Count III

Count III of plaintiff's second amended

complaint alleges a violation of 42 U.S.C. §1985(3). Defendants contend that such a claim is barred by the intracorporate conspiracy doctrine as outline in Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972).

Although there is a split among the circuits, see Travis v. Gary Community Mental Health Center, 921 F.2d 108, 109 (7th Cir. 1990), the Seventh Circuit applies the intracorporate conspiracy doctrine to §1985 claims, see e.g., Dombrowski v. Dowling, 459 F.2d 190, 196 (7th Cir. 1972); Travis, 921 F.2d at 110. The rationale is that an entity is able to act only through its employees and agents and to hold that it can conspire through its employees and agents is to say that it is conspiring with itself. Lac du Flambeau Band v. Stop Treaty Abuse -- Wisconsin, Inc., 759 F.Supp. 1339, 1351 (W.D. Wis. 1991). The intracorporate conspiracy doctrine has been used to grant summary judgment for defendants in a §1985(3) claim who were all agents or employees of the

same school board. Hull v. Cuyahoga Valley Board of Education, 926 F.2d 505, 509-10 (6th Cir. 1991) cert denied 111 S.Ct. 2917 (1991).

In this case, because all defendants are employees of the Board, the intracorporate conspiracy doctrine applies, and defendants' motion for summary judgment is granted.

Count IV

Count IV of plaintiff's second amended complaint alleges that defendants violated 42 U.S.C. §2000e (Title VII0 because they intentionally dismissed plaintiff because of her sex, because she was pregnant and because she was unmarried.

Initially, defendants contend that marital status is not a protected class under Title VII. It should be noted that this case does not involve a no-marriage rule, cf. EEOC v. Delta Air Lines, Inc., 578 F.2d 115 (5th Cir. 1978); Stroud v. Delta Airlines, Inc., 544 F.2d 892 (5th Cir. 1977); Sprogis v. United Airlines Inc., 444 F.2d 1194 (7th Cir. 1971), or a rule

which forbids or restricts the employment of married women but which is not applicable to married men, cf. 29 CFR §1604.4(a). Rather, this cause of action involves the dismissal of a pregnant woman who happens to be unmarried.

In determining the meaning of a statute, a federal court must first look to the plain language of the statute before looking beyond the words themselves. Oneida Tribe of Indians v. Wisconsin, 951 F.2d 757, 760-61 (7th Cir. 1991). Discrimination based on marriage is not forbidden by the language of Title VII. C.Antieau, Federal Civil Rights Acts Civil Practice §402 (2d Ed. 1980). The clear language of the statute does not enumerate marital status as a protected class, and discrimination based on marital status standing alone does not violate the protected classification of sex.

Because statutory interpretation is a question of law, United States v. Powell, 929 F.2d 1190, 1193 (7th Cir. 1991), defendants'

motion for summary judgment is granted as to the relief required in paragraph 29(b) of Count IV. However, plaintiff's claims of discrimination based on her sex must be addressed.

The basic allocation of burdens and presentation of proof in a Title VII individual disparate treatment case based on sex was articulated in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). A plaintiff has the burden of providing by a preponderance of the evidence a prima facie case of discrimination; if the plaintiff succeeds in proving a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection; and if the defendant meets this burden, the plaintiff must prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Burdine, 450 U.S. at 252-

53.

To show a prima facie case, the plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified but was rejected under circumstances which give rise to an inference of unlawful discrimination. Burdine, 450 U.S. at 253. Although the burden of establishing a prima facie case of disparate treatment is not onerous, Burdine, 450 U.S. at 253, any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act. International Brotherhood of teamsters v. United States, 431 U.S. 324, 358 (1977). A plaintiff must demonstrate at least that the action did not result from the two most common legitimate reasons on which an employer might rely: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Teamsters, 431 U.S. at 358 n.

44. Because facts will vary in Title VII cases, what is required to show a prima facie case will also vary. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n. 13 (1973).

Here, defendants argue that because plaintiff has failed to meet her prima facie case, summary judgment should be granted. See Randle, 876 F.2d at 568. Plaintiff has not met her burden of showing a prima facie case of disparate treatment. Plaintiff has only shown that she was a pregnant woman who did not receive tenure. Plaintiff has not shown by a preponderance of the evidence that she was rejected under circumstances that give rise to an inference of unlawful discrimination. In fact, Ester Solar, who was pregnant at the time of plaintiff's notice of dismissal, was given tenure. Further, plaintiff's final evaluation was the worst of all seven second-year probationary teachers at DeKalb High School in 1988-89.

Count V

Count V of plaintiff's second amended complaint alleges intentional infliction of severe emotional distress. Plaintiff alleges that the dismissal, "in and of itself," resulted in severe emotional distress and that certain employees made comments about plaintiff "[a]s a direct result of said dismissal." Defendants essentially claim that the facts alleged in the second-amended complaint and plaintiff's deposition do not rise to the level necessary to support such a claim.[5]

To state a cause of action for intentional infliction of emotional distress, the plaintiff must establish the following: (1) the defendant's conduct was extreme and outrageous;

---

[5] Although a Federal District Court can grant a motion for summary judgment in favor of a defendant on a claim of intentional infliction of emotional distress, see, e.g., Bast v. Ford Motor Credit Corp., 631 F.2d 508, 511 (7th Cir. 1980), a motion to dismiss would be a more appropriate procedure, see Miller v. Equitable Life Assurance Society of the United States, 181 Ill.App.3d 954, 537 N.E.2d 887, 889 (1st Dist. 1989).

(2) the emotional distress suffered by the plaintiff was severe; and (3) the defendant knew that severe emotional distress was certain or substantially certain to result from such conduct. McGrath v. Fahey, 126 Ill.2d 78, 533 N.E.2d 806, 809 (1988). Defendant's conduct must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and the distress must be so severe that no reasonable man could be expected to endure it. Public Finance Corp. v. Davis, 66 Ill.2d 85, 360 N.E.2d 765, 767 (1976). The slight hurts that individuals must endure in a complex society do not constitute extreme and outrageous conduct. Douglas v. American Information Technologies Corp., 877 F.2d 565, 571 (7th Cir. 1989).

It cannot be said that the dismissal of plaintiff, standing alone, is enough to show intentional infliction of emotional distress, and the facts presented are so one-sided that summary judgment must be granted. As the

comments made by other employees, plaintiff only has personal knowledge of a statement of Helen Farley and that statement does not show intentional infliction of emotional distress as a matter of law. Therefore, defendants' motion for summary judgment is granted as to Count V.

Conclusion

For the reasons mentioned above, defendants' motion for summary judgment is granted, and plaintiff's cross-motion for partial summary judgment on Count I is denied.

ENTER:

PHILIP G. REINHARD, JUDGE
UNITED STATES DISTRICT COURT

DATED: March 18, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

LINDA WHITMORE, Plaintiff,	)	
v.	)	No. 90-C-20143
BOARD OF EDUCATION OF DEKALB COMMUNITY SCHOOL DISTRICT NO. 428, JOHN REY, President of the Board of Education School District No. 428, Individually, BERNARD LOONEY, Principal, Individually, DR. JACK DEERE, District Superintendent, Individually, KEN KENNEDY, Assistant Principal, Individually, and ROBERT WILLIAMS, Assistant Superintendent, Individually,	)	Dated:June 9, 1992
Defendants.	)	

ORDER

On March 18, 1992, the court granted defendant's motion for summary judgment and denied plaintiff's cross motion for partial summary judgment. On April 15, 1992, this court granted plaintiff's motion for leave to file a motion to reconsider. Plaintiff's

motion is brought pursuant to Fed.R.Civ.P. 60(b)(1), (2) and (6).

Rule 60(b), in relevant part states, "On motion and upon terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial . . . or (6) any other reason justifying relief from the operation of the judgment." Relief from a judgment under Fed. R. Civ. P. 60(b) is an extraordinary remedy and is granted only in exceptional circumstances. Reinsurance Co. v. Administratia Asigurarilor, 902 F.2d 1275, 1277 (7th Cir. 1990). A party cannot use Fed.R.Civ.P. 60(b) as a substitute for appeal. Andrews v. Heinold Commodities Inc., 771 F.2d 184, 188 (7th Cir. 1985).

After careful review, plaintiff's motion states no grounds for relief under Fed.R.Civ.P.

60(b). No excusable neglect, newly discovered evidence or other reason justifying relief under Fed. R. Civ.P. 60(b) is presented. Plaintiff's motion is denied.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 8, 1993.

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

LINDA WHITMORE, Plaintiff-Appellant,	]	Appeal from the United States District Court for the Northern District of Illinois, Western Division.
No. 92-2442 v.	]	
BOARD OF EDUCATION OF DEKALB COMMUNITY SCHOOL DISTRICT NO. 428, individually, BERNARD LOONEY, Principal, individually, et al.,	]	No. 90 C 20143
	]	Philip G. Reinhard, Judge.
Defendants-Appellees.	]	

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed by plaintiff-appellant on August 18, 1993, no judge in active service has requested a vote thereon, and all the judges on the original panel have voted to deny the petition.

Accordingly,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby, DENIED.

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21 -- Civil Rights
Subchapter I -- Generally

Section 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State or

Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and

truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment lawfully assented to be him, or of his being or having been such juror; or is two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

United States Code Annotated
Title 5. Government Organization and Employees

Part III -- Employees
Subpart E -- Attendance and Leave
Chapter 63 -- Leave
Subchapter V -- Family and Medical Leave

Section 6382. Leave requirement

(a)(1) Subject to section 6383, an employee shall be entitled to a total of 12 administrative workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of the son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the

functions of the employee's position.

(2) The entitlement to leave under subparagraph (A) or (B) of paragraph (1) based on the birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(b)(1) Leave under subparagraph (A) or (B) of subsection (a)(1) shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employing agency of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2), and section 6383(b)(5), leave under subparagraph (C) or (D) of subsection (a)(1) may be taken intermittently or on a reduced leave schedule when medically necessary. In the case of an employee who takes leave intermittently or on as reduced leave schedule pursuant to this paragraph, any hours of leave so taken by such employee shall be subtracted from the total amount of leave remaining

available to such employee under subsection (a), for purposes of the 12-month period involved, on an hour-for-hour basis.

(2) If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1), that is foreseeable based on planned medical treatment, the employing agency may require such employee to transfer temporarily to an available alternative position offered by the employing agency for which the employee is qualified and that --

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(C) Except as provided in subsection (d), leave granted under subsection (a) shall be leave without pay.

(D) An employee may elect to substitute for leave under subparagraph (A), (B), (C), or (D) of subsection (a)(1) any of the employee's

accrued or accumulated annual or sick leave under subchapter I for any part of the 12-week period of leave under such subsection, except that nothing in this subchapter shall require an employing agency to provide paid sick leave in any situation in which such employing agency would not normally provide any such paid leave.

(E)(1) In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or placement, the employee shall provide the employing agency with not less than 30 days' notice, before the date the leave is to begin, of the employee's birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) is foreseeable based on planned medical treatment, the employee- (A) shall make a reasonable effort to schedule the

treatment so as not to disrupt unduly the operations of the employing agency, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and

(B) shall provide the employing agency with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21 -- Civil Rights

Section 2000e-2. Discrimination because of race, color, religion, sex or national origin.

(a) Employers. It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

United States Constitution
Amendment I

Congress shall make no law respecting an

establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rules of Civil Procedure
Rule 60

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment...

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(3)

FILED

JAN 10 1994

OFFICE OF THE CLERK

No. 93-919

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LINDA WHITMORE,

Petitioner,

v.

BOARD OF EDUCATION OF DeKALB COMMUNITY SCHOOL DISTRICT NO. 428, JOHN REY, President of Board of Education School District No. 428, Individually, BERNARD LOONEY, Principal, Individually, DR. JACK DEERE, District Superintendent, Individually, KEN KENNEDY, Assistant Principal, Individually, and ROBERT WILLIAMS, Assistant Superintendent, Individually,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a petition for writ of certiorari should be granted to review a district court's exercise of its discretion under Federal Rule of Civil Procedure 60(b)(6) in denying a motion seeking relief from a judgment on the ground that the district court's finding that the petitioner had no property interest in continued employment was contrary to a previous order which had been vacated.

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No. 93-919

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LINDA WHITMORE,

Petitioner,

v.

BOARD OF EDUCATION OF DeKALB COMMUNITY SCHOOL DISTRICT NO. 428, JOHN REY, President of Board of Education School District No. 428, Individually, BERNARD LOONEY, Principal, Individually, DR. JACK DEERE, District Superintendent, Individually, KEN KENNEDY, Assistant Principal, Individually, and ROBERT WILLIAMS, Assistant Superintendent, Individually,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully pray that this Honorable Court deny the petition for writ of *certiorari* to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on August 4, 1993. The court's unpublished opinion is set forth in the Appendix to this brief (App. 7-12). The order affirming the district court is reported in a Table of Decisions Without Published Opinions at 1 F.3d 1245 (7th Cir. 1993).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves application of Federal Rule of Civil Procedure 60(b). In addition, U.S. Const. amend XIV, § 1; 42 U.S.C. § 1983; and paragraph 24-11 of the Illinois School Code, Ill. Rev. Stat. ch. 122, para. 24-11 (1989), recodified as 105 ILCS 5/24-11 (1992), are involved in that the underlying claim is predicated thereon. (App. 1-6)

Insofar as the petition cites constitutional provisions and federal statutes relating to petitioner's claims under the First and Ninth Amendments to the United States Constitution, 42 U.S.C. § 1985, and 42 U.S.C. § 2000e-2(a), those claims have been abandoned and those provisions are not involved in this case. (Pet. at 2-3)

STATEMENT OF THE CASE

The petition does not accurately reflect the case which is before this court. As this case now stands, the sole remaining claim at issue contends that petitioner had a protectable property interest in continued employment—commonly known as tenure—and that her dismissal by the respondents without notice or a hearing denied her due process. Petitioner did not perfect an appeal from the order entering summary judgment in favor of the respondents on all her claims, and limited her contentions in the appeal from the denial of her motion for reconsideration to her due process claim. Accordingly, petitioner's equal protection and Title VII claims are no longer at issue,

and the facts and circumstances regarding her pregnancy or unmarried status are immaterial to the issue before this Court concerning the denial of her motion under Federal Rule of Civil Procedure 60(b)(6).

Petitioner's Employment History

Moreover, petitioner's statement that she was never notified of any deficiency in her performance prior to her dismissal is incorrect. Petitioner was employed in 1987 by the respondent, the Board of Education of DeKalb Community School District No. 428, as a probationary teacher, and rehired—again on probationary status—for an additional year. During her probationary period petitioner was evaluated six times. The evaluations noted several deficiencies regarding petitioner's lack of enthusiasm, slow pacing, and failure to motivate students. Those evaluations and cited problems were reviewed and discussed with petitioner in post-evaluation conferences. Petitioner's final performance rating in 1989 was the worst of all second-year probationary teachers, and again noted deficiencies relating to lack of enthusiasm, slow pacing and failure to motivate. On March 20, 1989, the respondent Board of Education voted not to rehire six probationary teachers, including the petitioner, and notified petitioner by letter that her contract would not be renewed "because the performance of your duties has failed to meet the district's expectations."

The Proceedings And Rulings Below

Petitioner filed a multi-count complaint seeking damages predicated upon the Board's vote not to renew her teaching contract. Respondents moved pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the due process claim

on the basis that petitioner, as a probationary teacher, had no property interest in continued employment under Illinois law. On that issue the district court initially found that the respondents did not provide petitioner with specific reasons for her termination as required by Illinois law, and that petitioner therefore had tenure. Respondents filed exceptions to those findings as premature on a motion pursuant to Federal Rule of Civil Procedure 12(b)(6), and asserted that they were entitled to present evidence that petitioner's performance evaluations provided the statutorily-required notice of the reasons for petitioner's dismissal. Accordingly, the district court struck its original order and entered a modified order which deleted the findings regarding the sufficiency of the termination notice and petitioner's tenure status. (Pet. App. at 42-71)

Subsequently petitioner and respondents moved for summary judgment pursuant to Federal Rule of Civil Procedure 56 on the question whether petitioner had acquired tenure, and thereby a protectable property interest. In support of their motion the respondents submitted evidence that the petitioner had received specific notice of the reasons for her termination through her performance evaluations. On March 19, 1992, the district court ruled that the petitioner in fact had *not* acquired tenure, granted summary judgment to respondents on all claims, and denied petitioner's cross-motion for partial summary judgment. (Pet. App. at 72-98)

Petitioner did not appeal the summary judgment order within 30 days under Federal Rule of Appellate Procedure 4(a). Instead, petitioner filed a "motion to reconsider" portions of the summary judgment order pursuant to Federal Rule of Civil Procedure 60(b), particularly its finding that she did not have tenure. On June 9, 1992, the district

court denied the motion. Petitioner filed a notice of appeal on June 17, 1992, from both the summary judgment order and the order denying her motion under Federal Rule of Civil Procedure 60(b). The Court of Appeals dismissed petitioner's tardy appeal from the summary judgment order for lack of jurisdiction, stating "[t]his appeal may proceed on review of the denial of plaintiff-appellant's Rule 60(b) motion only." (App. 14)

With respect to petitioner's motion under Rule 60(b), the Court of Appeals considered only whether the district court abused its discretion in denying the motion. (App. 10) The Court noted that the petitioner misconstrued the issue before it and its limited scope of review:

> "Whitmore fails to argue on appeal what she needs to show: that the district court abused its discretion. Instead, she appears to be challenging the district court's order granting summary judgment, presenting her arguments as though this court were engaged in *de novo* review of a question of law." (App. 11)

The Court held that the district court neither committed an error of law nor exceeded its permissible bounds of judgment in denying petitioner's motion, and therefore did not abuse its discretion. (App. 10)

In addition the Court noted that petitioner's argument that the motion for reconsideration stated "exceptional circumstances" based on the fact that the judge who entered summary judgment reached a "different conclusion" regarding her tenure status than the district judge who presided over the motion to dismiss, failed to meet the rigorous standards for relief under Federal Rule of Civil Procedure 60(b), and was predicated on the mistaken belief that the two judges were engaged in the same type of review. (App. 11)

REASONS FOR DENIAL OF THE WRIT

I.

THERE ARE NO SPECIAL OR IMPORTANT REASONS TO REVIEW THE DECISION OF THE COURT OF APPEALS THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION, UNDER THE CIRCUMSTANCES OF THIS CASE, IN DENYING PETITIONER'S MOTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b)(6)

Petitioner seeks a writ of *certiorari* to the Court of Appeals to review its opinion affirming the order of the district court denying her motion, under Federal Rule of Civil Procedure 60(b)(6), to reconsider a prior order wherein it found that petitioner did not have a property interest under state law. The sole issue in the Court of Appeals was whether the district court had abused its discretion in denying that motion, wherein petitioner alleged that a preceding presiding judge had entered—then vacated—a contrary finding on the same issue. This case does not present any special or important reasons to review its judgment on that issue, and in any event the Court of Appeals correctly held that district court did not abuse its discretion because the motion for reconsideration did not demonstrate "exceptional circumstances" as required by Rule 60(b)(6).

Manifestly this case does not present any "special and important reasons" for granting a writ of *certiorari* as described in Rule 10 of the rules of this Court, or otherwise. There are no conflicting decisions of the courts of appeals, and no conflict with any applicable decision of this Court. The question whether the district court abused its discretion under Rule 60(b)(6), under the circumstances of this case, involves no question of substantive law. The

district court's exercise of its discretion turned upon the unique facts before it on the motion to reconsider. In essence the petition asks this court to conduct *de novo* review of her motion for reconsideration, and to extend no deference to the district court judge who reviewed the evidence on the motions for summary judgment, and who was in the best position to determine whether exceptional circumstances existed which warrant relief from that judgment. Moreover, to the extent that the petition argues that summary judgment was erroneously granted to the respondents, that order is not the subject of this appeal.

II.

THE JUDGMENTS BELOW DO NOT IMPAIR FEDERAL OR STATE PUBLIC POLICY

In an effort to create a special or important reason for granting her petition, petitioner argues that *certiorari* should be granted to uphold federal and state public policy embodied in the Family and Medical Leave Act of 1993 (5 U.S.C. §§ 6381-6387) and the Illinois School Code (105 ILCS 5/1-25 (1992)).

As previously noted, the Court of Appeals' review was limited to determining whether the order denying the Rule 60(b) motion constituted an abuse of discretion. (App. 10) Manifestly the limited scope of its holding that there was no abuse of discretion does not, expressly or impliedly, impair such statutory laws or their underlying public policy.

Petitioner's public policy argument improperly focuses on a ruling that was *not* before the Court of Appeals—the finding in the underlying summary judgment order that she lacked tenure under Illinois law. While that order was not before the Court of Appeals, the record nonetheless refutes petitioner's contention.

The district court demonstrated that it was fully cognizant of applicable Illinois School Code provisions and case authorities, and that the efficacy of petitioner's claim turned on whether she was given "specific reasons" for her dismissal. (Pet. App. at 82-86) Its conclusion that the circumstances of this case, viewed in their entirety, complied with Illinois law, plainly turned on those facts. Since the court analyzed those facts under the proper legal standard, its ruling does not impair the "balance" established by the state tenure laws.

Nor does the public policy embodied in the Family and Medical Leave Act have any bearing on petitioner's claim that the procedures followed by the respondents in dismissing her were defective under Illinois law. Resolution of *that* issue has nothing whatsoever to do with the Act's policy of protecting the employment security of employees who take maternal or pregnancy leave. As the petitioner has abandoned or waived all claims that she was discriminated against on account of her pregnancy, she cannot invoke public policy regarding pregnancy leave as a ground for granting a writ of *certiorari* in this case.

Moreover, even if petitioner had preserved her pregnancy-based claims, petitioner concedes the Family and Medical Leave Act of 1993 would have no bearing on her challenge to the Board's decision in 1989 not to renew her teaching contract. In essence petitioner invites this Court to issue a writ of *certiorari* so that it can issue an advisory opinion to school districts on an issue that does not—and could not—exist in this case.

III.

THE ORDER OF THE DISTRICT COURT WAS CORRECT AND PROPERLY AFFIRMED BASED ON THE LACK OF EXCEPTIONAL CIRCUMSTANCES TO WARRANT THE GRANTING OF RELIEF UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b)(6)

The petition should be denied for the additional reason that the judgments below were manifestly correct as petitioner's motion under Federal Rule of Civil Procedure 60(b)(6) set forth no "exceptional circumstances" which warranted relief from the judgment. The motion sought relief due to what the petitioner describes as "diametrically opposite conclusions" on whether petitioner had acquired tenure by two different judges who presided in this case in the district court. (Pet. at 18) As the Court of Appeals correctly noted, those grounds fail to satisfy the rigorous grounds for relief under Rule 60(b). (App. 10)

The first ruling was entered by the first district court judge who presided over the respondents' motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Specifically relying on the allegations in the complaint in support of petitioner's tenure-based claim, the court made an initial finding to the effect that respondents did not provide sufficiently specific reasons for not renewing petitioner's contract, and that petitioner therefore had acquired tenure. (Pet. App. at 22)

Respondents filed exceptions to the finding that petitioner was tenured as premature and inappropriate on a motion under Rule 12(b)(6), and because they were entitled to present evidence that petitioner's performance evaluations provided actual notice of her teaching deficiencies and the reasons for her termination. Based thereon

the court modified its order and vacated the disputed finding. (Pet. App. at 52)

Subsequently both petitioner and respondents moved for summary judgment on the issue of whether petitioner had tenure. Those motions were heard by a successor district court judge, to whom this case had been reassigned. After reviewing the stipulated facts, exhibits and evidence that petitioner's deficiencies were noted in her performance evaluations, that petitioner was repeatedly told of problems that needed to be corrected, and that her final performance rating was the worst of all final-year probationary teachers, the court found, "based on the prior evaluations of [petitioner]" and the actual notice of deficiencies in those evaluations, that the respondents had dismissed petitioner in accordance with Illinois law and no tenure was conferred. (Pet. App. at 84-85)

Respondents respectfully submit that petitioner's argument that the two judges were engaged in the same standard of review and had reviewed the same facts (Pet. at 17-18) is contrary to law and the record, and is refuted by the orders. The Court of Appeals aptly summarized the fallacy of petitioner's contention:

> The two judges, first of all, were not engaged in the same type of review. So it is not surprising that they could have reached "different conclusions." The first judge considered the [respondents'] motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The second judge entertained the [respondents'] motion for summary judgment. A court's consideration of whether a complaint states a legal claim versus its determination whether the absence of a material issue of fact entitles a party to judgment easily can lead to different conclusions. Many a complaint—this one, for instance—clears the hurdle of

> a Rule 12(b)(6) motion only to succumb to a motion for summary judgment. If one judge happens to deny the 12(b)(6) motion and another grants summary judgement, neither one nor the other need have reached "the wrong result." (App. 11)

Similarly, the argument at pages 19-23 of the petition that the courts below failed to properly distinguish the facts of this case from the facts of other cases which involved claims of "tenure" again assumes, incorrectly, that the summary judgment order is the subject of this appeal. Petitioner's argument that this case is distinguishable from *Howard v. Board of Educ. of Freeport Sch. Dist. No. 145*, 160 Ill. App. 3d 309, 513 N.E.2d 545 (1987), *may* have been pertinent had petitioner taken a direct appeal from the summary judgment order. As previously established, petitioner did not appeal that order. As noted by the Court of Appeals, if petitioner wished to challenge the district court's application of law in entering summary judgment, she should have filed a direct appeal in a timely manner. (App. 12) Consequently, the aforementioned argument is immaterial to whether the district court abused its discretion under Rule 60(b)(6) and cannot support a writ of *certiorari* to review a ruling on that distinct issue.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

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United States Constitution
Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code — Title 42

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Illinois Revised Statutes
chapter 122, section 24-11

24-11. Boards of education—Boards of school inspectors—Contractual continued service

§ 24.11. Boards of Education—Boards of School Inspectors—Contractual continued service. As used in this and the succeeding Sections of this Article, "teacher" means any or all school district employees regularly required to be certified under laws relating to the certification of

teachers, "board" means board of directors, board of education or board of school inspectors, as the case may be, and "school term" means that portion of the school year, July 1 to the following June 30, when school is in actual session. This Section and Sections 24-12 through 24-16 of this Article apply only to school districts having less than 500,000 inhabitants.

Any teacher who has been employed in any district as a full-time teacher for a probationary period of 2 consecutive school terms shall enter upon contractual continued service unless given written notice of dismissal stating the specific reason therefor, by certified mail, return receipt requested by the employing board at least 60 days before the end of such period. For the purpose of determining contractual continued service, the first probationary year shall be any full time employment from a date before November 1 through the end of the school year. If, however, a teacher has not had one school term of full-time teaching experience before the beginning of such probationary period, the employing board may at its option extend such probationary period for one additional school term by giving the teacher written notice by certified mail, return receipt requested at least 60 days before the end of the second school term of the period of 2 consecutive school terms referred to above. Such notice must state the reasons for the one year extension and must outline the corrective actions which the teacher should take to satisfactorily complete probation.

Any full-time teacher who is completing the first year of the probationary period described in the preceding paragraph, or any teacher employed on a full-time basis not later than January 1 of the school term, shall receive written notice from the employing board at least 60 days before the end of any school term whether or not he will be re-employed for the following school term. If the board fails to give such notice, the employee shall be deemed reemployed, and not later than the close of the then current school term the board shall issue a regular contract

to the employee as though the board had reemployed him in the usual manner.

Contractual continued service shall continue in effect the terms and provisions of the contract with the teacher during the last school term of the probationary period, subject to this Act and the lawful regulations of the employing board. This Section and succeeding Sections do not modify any existing power of the board except with respect to the procedure of the discharge of a teacher and reductions in salary as hereinafter provided. Contractual continued service status shall not restrict the power of the board to transfer a teacher to a position which the teacher is qualified to fill or to make such salary adjustments as it deems desirable, but unless reductions in salary are uniform or based upon some reasonable classification, any teacher whose salary is reduced shall be entitled to a notice and a hearing as hereinafter provided in the case of certain dismissals or removals.

The employment of any teacher in a program of a special education joint agreement established under Sections 3-15.14, 10-22.31 or 10-22.31a shall be under this and succeeding Sections of this Article. For purposes of attaining and maintaining contractual continued service and computing length of continuing service as referred to in this Section and Section 24-12, employment in a special educational joint program shall be deemed a continuation of all previous certificated employment of such teacher for such joint agreement whether the employer of the teacher was the joint agreement, the regional superintendent, or one of the participating districts in the joint agreement.

Any teacher employed after July 1, 1987 as a full-time teacher in a program of a special education joint agreement, whether the program is operated by the joint agreement or a member district on behalf of the joint agreement, for a probationary period of two consecutive years shall enter upon contractual continued service in all of the programs conducted by such joint agreement which the

teacher is legally qualified to hold. In the event of a reduction in the number of programs or positions in the joint agreement, the teacher on contractual continued service shall be eligible for employment in the joint agreement programs for which the teacher is legally qualified in order of greater length of continuing service in the joint agreement unless an alternative method of determining the sequence of dismissal is established in a collective bargaining agreement. In the event of the dissolution of a joint agreement, the teacher on contractual continued service who is legally qualified shall be assigned to any comparable position in a member district currently held by a teacher who has not entered upon contractual continued service or held by a teacher who has entered upon contractual continued service with shorter length of contractual continued service.

The governing board of the joint agreement, or the administrative district, if so authorized by the articles of agreement of the joint agreement, rather than the board of education of a school district, may carry out employment and termination actions including dismissals under this Section and Section 24-12.

For purposes of this and succeeding Sections of this Article, a program of a special educational joint agreement shall be defined as instructional, consultative, supervisory, administrative, diagnostic, and related services which are managed by the special educational joint agreement designed to service two or more districts which are members of the joint agreement.

Each joint agreement shall be required to post by February 1, a list of all its employees in order of length of continuing service in the joint agreement, unless an alternative method of determining a sequence of dismissal is established in an applicable collective bargaining agreement.

The employment of any teacher in a special education program authorized by Section 14-1.01 through 14-14.01,

or a joint educational program established under Section 10-22.31a, shall be under this and the succeeding Sections of this Article, and such employment shall be deemed a continuation of the previous employment of such teacher in any of the participating districts, regardless of the participation of other districts in the program. Any teacher employed as a full-time teacher in a special education program prior to September 23, 1987 in which 2 or more school districts participate for a probationary period of 2 consecutive years shall enter upon contractual continued service in each of the participating districts subject to this and the succeeding Sections of this Article, and in the event of the termination of the program shall be eligible for any vacant position in any such districts for which such teacher is qualified.

Federal Rule of Civil Procedure 60
Relief from Judgment or Order
Subdivision (b)

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered

or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

[UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 53]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued July 7, 1993

Decided August 4, 1993.

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Senior Circuit Judge*

LINDA WHITMORE,

Plaintiff-Appellant,

No. 92-2442 *v.*

BOARD OF EDUCATION OF DEKALB COMMUNITY SCHOOL DISTRICT NO. 428, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Western Division.
No. 90 C 20143—Philip G. Reinhard, *Judge.*

ORDER

Linda Whitmore appeals from the district court's denial of her motion to reconsider under Federal Rule of Civil Procedure 60. We affirm.

I

Whitmore, a high school teacher, sued the DeKalb school board and various school district officials after the board voted not to renew her contract. She sought relief pursuant to 42 U.S.C. §§ 1983, 1985, 2000e-h, as well as under state law for intentional infliction of emotional distress.

The district court granted in part and denied in part the defendants' motion under Federal Rule of Civil Procedure 12(b)(6). Initially, the court found that Whitmore had not received sufficiently specific reasons for her termination. Subsequently, however, the district court vacated that order and deleted its finding that Whitmore had received tenure under state law.

Another judge took over the case and granted the defendants' motion for summary judgment as to all of Whitmore's claims. She then filed a "motion to reconsider" the summary judgment pursuant to Federal Rule of Civil Procedure 60(b), but before the time for taking a direct appeal had expired. The district court denied this motion and Whitmore appealed.

II

A motion under Rule 60(b) seeks an extraordinary remedy. *Merit Insurance Co. v. Leatherby Insurance Co.*, 714 F.2d 673, 683 (7th Cir.), *cert. denied*, 464 U.S. 1009 (1983). That is especially true under Rule 60(b)(6). Although this "catch-all provision", *id.*, authorizes the district court to vacate its order or judgment for "any reason justifying relief from the operation of the judgment", Rule 60(b)(6) is not as open-ended as its language or nickname suggest. Relief is available only (1) if Rules 60(b)(1) through (5) do not apply; and (2) if the district court, in its sound discretion, finds that equitable action is necessary to accomplish

justice. *Peacock v. Board of School Comrs.*, 721 F.2d 210, 214 (7th Cir. 1983) (per curiam). These conditions will obtain only in "extraordinary circumstances that create a substantial danger that the underlying judgment was unjust." *Margoles v. Johns*, 798 F.2d 1069, 1073 (7th Cir. 1986), *cert. denied*, 482 U.S. 905 (1987); *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1204-05 (7th Cir. 1984) ("the general rule in this circuit is that relief from a judgment under [R]ule 60(b) is an extraordinary remedy and is granted only in exceptional circumstances."). *Cf. Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. Partnership*, 113 S. Ct. 1489, 1497 (1993).

Our cases emphasize that Rule 60(b) is a substitute neither for direct appeal nor for a motion under Rule 59. In *Parke-Chapley Construction Co. v. Cherrington*, 865 F.2d 907 (7th Cir. 1989), for instance, Judge Cummings explained the rationale for this limitation on Rule 60(b):

> If plaintiff believed the district court was mistaken as a matter of law in dismissing the original complaint, he should have appealed . . . or he might have filed a timely motion under FRCP 59 to vacate the judgment of dismissal and for leave to amend his complaint. . . . The policy behind such a reading of FRCP 60(b) is clear; parties should not be allowed to escape the consequences of their failure to file a timely appeal by addressing questions of law to the trial court for reconsideration. That is the function of appellate courts. If allowed to raise the same questions in a FRCP 60(b) motion that would have been raised in an appeal from the merits, a party would be able to effect an indirect extension of the time for appeal by appealing the FRCP 60(b) motion within thirty days of its disposition.

Id. at 915 (quotations and citations omitted).

The function of Rule 60(b) necessarily narrows the scope of this court's review to a "most limited" consideration.

Reinsurance Company of America, Inc. v. Administratia de Stat, 902 F.2d 1275, 1277 (7th Cir. 1990). Regardless of whether "relief from the judgment might have been obtained had an appeal been taken", *Parke-Chapley Construction Co.*, 865 F.2d at 915 (quotation and citation omitted), the court may consider only whether the district court abused its discretion.[1] In the absence of extraordinary circumstances, reaching the merits of the underlying judgment is not permissible. *Lee v. River Forest*, 936 F.2d 976, 979 (7th Cir. 1991). *Brennan v. Midwestern United Life Insurance Co.*, 450 F.2d 999, 1003 (7th Cir. 1971) (court's function in reviewing the denial of a Rule 60(b) motion is "not to determine whether the court was substantively correct in entering the judgment from which relief was sought but is limited to deciding whether the judge abused his discretion . . ." in ruling that motion failed to show sufficient grounds for relief) (citations omitted), *cert. denied*, 450 U.S. 999 (1972).

Whitmore's arguments in favor of her motion fail to satisfy the rigorous standards of Rule 60(b). The district court found that Whitmore's motions contained no grounds justifying relief under subsection (1) (mistake, inadvertence, surprise, or excusable neglect), or under subsection (2) (newly discovered evidence that could not have been discovered by due diligence in time to move for a new trial). Moreover, the district court judge concluded that Whitmore was not entitled to relief under subsection (6). In reaching this conclusion, the district court neither committed an error of law nor exceeded permissible bounds of judgment.

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[1] A trial court abuses its discretion either by committing an error of law, *United States v. Barber*, 881 F.2d 345, 349 (7th Cir. 1989), *cert. denied*, 495 U.S. 922 (1990), or by exceeding the "permissible bounds of judgment." *American Hospital Supply Corp. v. Hospital Products, Ltd.*, 780 F.2d 589, 594 (7th Cir. 1986).

Whitmore fails to argue on appeal what she needs to show: that the district court abused its discretion. Instead, she appears to be challenging the district court's order granting summary judgment, presenting her arguments as though this court were engaged in *de novo* review of a question of law. Our review of the denial of a motion under Rule 60(b)(6) in certain circumstances will require us to consider the merits underlying a summary judgment. But Whitmore seems to think that there was a substantial danger that this underlying judgment was unjust because the judge who granted the summary judgment reached what her lawyer characterized at oral argument as a different conclusion than the first judge. There are at least three things wrong with this description of events.

The two judges, first of all, were not engaged in the same type of review. So it is not surprising that they could have reached "different conclusions." The first judge considered the defendants' motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The second judge entertained the defendants' motion for summary judgment. A court's consideration of whether a complaint states a legal claim versus its determination whether the absence of a material issue of fact entitles a party to judgment easily can lead to different conclusions. Many a complaint—this one, for instance—clears the hurdle of a Rule 12(b)(6) motion only to succumb to a motion for summary judgment. If one judge happens to deny the 12(b)(6) motion and another grants summary judgment, neither one nor the other need have reached "the wrong result."

But the judges here did not, as Whitmore alleges, reach different legal conclusions. In granting in part and denying in part the motion under Rule 12(b)(6), the first judge initially found that Whitmore was not given sufficiently

specific reasons for her termination—a requirement under Illinois law. Accordingly, he found her to be tenured as a matter of law. In response, the defendants filed exceptions to that ruling, arguing that they were entitled to present evidence that Whitmore's evaluations provided actual notice of her deficiencies. The district court subsequently struck its original order as premature and entered an amended order that deleted the finding that Whitmore had achieved tenure. That is how matters stood when the second judge assumed control of the case. After considering the pleadings, Judge Reinhard granted summary judgment to the defendants on all claims. His decision held that under Illinois law the performance deficiencies noted in Whitmore's evaluations, in conjunction with written notice, met the statutory requirements. Accordingly, she was not tenured. This is the very same conclusion arrived at by the first judge after he recognized that he had ruled prematurely on the issue.

Third, even if Whitmore were correct that the two judges reached opposite conclusions, we fail to see how there would be a substantial danger that the last judgment necessarily would be unjust.

Unlike many of the parties in cases we see involving Rule 60(b), Whitmore was not attempting to evade the time limits of direct appeal under Rule 4(a). She filed her motion under Rule 60(b) before the 30-day period for appeal had expired. Since Whitmore in essence is seeking to challenge the district court's conclusions of law in entering summary judgment, she should have filed a direct appeal in a timely manner. Rule 60(b)(6) does not allow her attorney to undo his strategic mistakes.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 28, 1992.

Before

Hon. JOEL M. FLAUM, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

LINDA WHITMORE,

Plaintiff-Appellant,

No. 92-2442 v.

BOARD OF EDUCATION OF DEKALB COMMUNITY SCHOOL DISTRICT NO. 428, JOHN REY, President, Board of Education School District No. 428, individually, BERNARD LOONEY, Principal, individually, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Western Division.
No. 90 C 20143—Philip G. Reinhard, *Judge.*

ORDER

On consideration of the "JURISDICTIONAL MEMORANDUM" filed by plaintiff-appellant on July 10, 1992, and the "RESPONSE TO PLAINTIFF'S JURISDICTIONAL MEMORANDUM" filed by defendants-appellees on July 21, 1992,

IT IS ORDERED that this appeal is DISMISSED for lack of jurisdiction as to the judgment entered on March 19,

1992. Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal in a civil case be filed in the district court within 30 days of the entry of the judgment appealed. In this case judgment was entered on March 19, 1992, and the notice of appeal was filed on June 17, 1992, 58 days late; plaintiff's motion to reconsider did not affect the appeal period because a 60(b) motion does not toll the time to appeal. *See* Fed. R. App. P. 4(a)(4). The district court has not granted an extension of the appeal period, see Rule 4(a)(5), and this court is not empowered to do so, see Fed. R. App. P. 26(b).

Appellant's argument (in her responsive memorandum) that her motion for leave to file a Rule 60(b) motion was intended (and therefore should be construed) as a motion to extend time to file a late appeal, *see* Fed. R. App. P. 4(a)(5), is far-fetched. The motion requests no such relief.

Although appellant's appeal is timely as to the denial of her 60(b) motion, the appeal is dismissed to the extent that appellant seeks review of the merits judgment. This appeal may proceed on review of the denial of plaintiff-appellant's Rule 60(b) motion only.